Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1975

No. 75-268

HYMAN RADZANOWER,

Petitioner,

vs.

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W.J. BRESNAN, H.J. SCHAFLY, LEONARD TOW, R.C. TODD, JR., B.P. SIMON, J.B. GREEN, L.H. READ, R.G. WILSON, H.E. FLAHERTY, B.D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R.F. LEWIS, P.L. LOWE, CHARLES LUCKMAN, M.B. MITCHELL, A.E. PUCKETT, J.H. RICHARDSON, M.E. LIVINGSTON, JACK WRATHER, and FIRST NATIONAL BANK OF BOSTON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Hyman Radzanower, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered May 23, 1975 affirming judgment of the District Court for the Southern District of New York entered October 21, 1974.

JUDGMENTS BELOW

The judgment of the District Court is not reported. It is set forth in Appendix A page 1a. The judgment of the Court of Appeals is not reported; it is set forth in Appendix B page 3a.

JURISDICTION

Defendant-respondent, First National Bank of Boston (hereinafter "Bank"), was named as a defendant in this class action upon the ground that it conducted banking business in the State of New York and was involved with defendant Teleprompter and other defendants in acts violative of the Securities Exchange Act of 1934 (15 U.S.C. 78a, et seq.) ("Exchange Act"), the New York Statute ("Martin Act") and common law.

Jurisdiction in the District Court is grounded on §27 of the Exchange Act and pendent jurisdiction.

Defendant, Boston Bank, moved on October 21, 1974 to dismiss under Rules 12(b)(2) and (3) Fed. R. Civ. P. for improper venue, contending that Massachusetts was the proper venue. The District Court granted the motion. No challenge was made to sufficiency of allegations of the complaint.

Plaintiff appealed to the Court of Appeals grounding jurisdiction on 28 U.S.C. §1291 and §1294. It affirmed without opinion on May 23, 1975 (Appendix B page 4a).

The jurisdiction of this Court is based on 28 U.S.C. §1254(1).

QUESTION PRESENTED

Should not this Court resolve once and for all a serious conflict among the Circuits, by declaring that the more liberal venue provisions of the Securities Act of 1933, 15 U.S.C. §77(a) ("Securities Act") and the Exchange Act, prevail over those of the stringent National Bank Act of 1864, 12 U.S.C. §94 ("National Bank Act")?

STATUTORY PROVISIONS INVOLVED

1. The venue provision of the National Bank Act (12 U.S.C. §94) provides:

> "Actions and proceedings against any association under this Chapter may be had in any district or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

2. The general venue provisions of 28 U.S.C. §1391 provide in pertinent part:

> "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district wherein all defendants reside, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or in doing business, and such judicial district shall be regarded as the residence of such corporation for venue provisions."

3. The Securities Act (15 U.S.C. §77n(a)) states:

"(a) The district courts of the United States courts, and the United States courts of any territory, shall have juridiction of offenses and violations under this sub-chapter and under the rules and regulations promulgated by the commission in respect thereto, and concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this sub-chapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which defendant is an inhabitant or wherever the defendant may be found."

4. The Exchange Act (15 U.S.C. §78aa) provides:

"The district courts of the United States, and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction over violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant . . . ."

5. The Banking Law of New York (Art. 3 §131, subd. 3) provides that a non-New York Bank, as therein specified:

". . . may act as trustee, guardian, executor, administrator, or in any other fiduciary capacity under and last will and testament or codicil thereto or other testamentary writing or under any deed of trust inter vivos or other written instrument establishing a trust, or by the

appointment of any court of said state, may act in this state in any such fiduciary capacity, provided similar domestic corporations which have the power under the law of this state to act herein in any such fiduciary capacity, are permitted to act in like fiduciary capacity in the state where such foreign corporation has its domicile, provided that if such foreign corporation proposes to act in any fiduciary capacity in this state and to do is required to file its qualification in the Surrogates's court of this state, it shall file in the office of the clerk of the surrogate's court of the county in which appointment is pending.

(a) a duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing such clerk and his successors its true and lawful attorney; upon whom all process in any action or proceeding against such fiduciary or the acts or defaults of such corporation in reference to such estate, trust or fund may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state, and (b) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office;"

and

"provided further that if such foreign corporation proposes to act in any other fiduciary

capacity in the state, it shall file in the office of the superintendent (a) a duly executed instrument in writing, by its terms of indefinite duration, and irrevocable, appointing the superintendent and his successors its true and lawful attorney; upon whom all process in any action or proceeding against such fiduciary affecting or relating to the estate, trust or fund held or represented by such fiduciary or the acts or defaults of such corporation in reference to such estate, trust or fund may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state, (b) a written certificate of designation, which may be changed from time to time thereafter by the filing of a new certificate of designation, specifying the name and address of the officer, agent or other person to whom such process shall be forwarded by the superintendent, and (c) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office."

STATEMENT OF THE CASE

First National Bank of Boston (herein "Boston Bank") was named a party defendant in this class action upon the ground that it conducted banking business in the State of New York and was involved with defendant Teleprompter and other defendants in security transactions violative of the Securities Exchange Act of 1934 (15 U.S.C. §78a *et seq.*), the New York State Statute

(Martin Act) and common law. Jurisdiction was based on §27 of the Securities Exchange Act and pendent jurisdiction. No challenge was presented to sufficiency of the allegations upon which liability against defendants was asserted and upon which recovery was sought. Boston Bank moved to dismiss "on the ground of improper venue" and the motion was granted solely on that basis (Appendix, 1a).

The New York State Banking Law provides (Art. 3, §131, subd. 3) that a non-New York Bank may act as trustee, guardian, executor, administrator or in any other fiduciary capacity under a testamentary writing or trust instrument, or by court appointment, provided similar domestic corporations having the power to act under the law of New York State in such fiduciary capacity are permitted to act in like fiduciary capacity in the state where such foreign corporation is domiciled, and upon condition that such foreign banking corporation file with the Clerk of the Surrogates Court, or in the office of the Superintendent of Banks, as the case may be, a duly executed instrument in writing, of indefinite duration, irrevocably appointing such Clerk or the Superintendent or their successors, its true and lawful attorney upon whom all process in any action or proceeding against such fiduciary affecting or relating to the estate, trust or fund held or represented by such fiduciary, or the acts or defaults of such corporation in reference thereto, may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state.

Boston Bank on January 15, 1971, wrote to the State of New York Banking Department:

> "We are enclosing herewith for filing, as required by Section 131(3) of the New York Banking law, the following instruments on behalf of The First National Bank of Boston:
>
> 1. A Power of Attorney executed by The First National Bank of Boston under date of January 15, 1971, designating the Superintendent of Banks of the State of New York or his successor, as agent for service of process, and further designating T. McLean Griffin, Cashier, and his successors in office, as being the appropriate officer to whom process shall be forwarded."

The enclosed Power of Attorney specified that:

> "This Bank desires to transact business in the State of New York in conformity with Section 131(3) of the New York State Banking Law. The First National Bank of Boston hereby constitutes and appoints the Superintendent of Banks, State of New York, and his successors in such office, to be the true and lawful attorney of this Bank in and for the State of New York, upon whom all lawful processes in any action or proceeding against this Bank in New York may be served in like manner and with the same effect as if this Bank existed therein."

The foregoing language did not limit the Superintendent as designee for service of process, specifically as provided in the

statutory language, to "any action or proceeding against such fiduciary [Boston Bank] affecting or relating to the estate, trust or fund held by such fiduciary" or its "acts or defaults" in reference thereto. District Judge MacMahon, although noting that "the language of the designation is broad," held that it "specifically evidences an intent to comply with Section 131(c) of the New York Banking Law" and therefore it did not operate "as a waiver of the venue provision" that a national bank may be sued only in the district in which it is established (12 U.S.C. §94), because the waiver thus narrowly construed did not embrace this lawsuit, which did not fall within the foregoing statutory categories.

The venue provision of the National Bank Act (12 U.S.C. §94) was applied because Boston Bank is established in Boston, Massachusetts and maintains no office, facility, place of business or agent in New York and notwithstanding the undisputed fact that the acts, activities and security transactions in which Boston Bank was involved, participated in, aided and abetted, as alleged in the complaint herein and charged to be in violation of the Securities and Exchange Act, all took place in New York. It is noteworthy in this connection that Boston Bank failed to do what Chase Bank did in *Buffum v. Chase Nat. Bank of City of New York*, 192 F.2d 58 (7 Cir. 1951), which had initially filed a designation authorizing its agent to accept service "in all suits in Illinois," who when replaced by another, the replacement was authorized to accept service "in matters involving the limited purpose" for which Chase Bank "was qualified to do business in Illinois" (p. 61). Nonetheless, Judge MacMahon held that because Boston Bank "is established in Boston, Massachusetts, within the meaning of 12 U.S.C. Section

94," the broad designation filed as aforesaid "is not a waiver of this venue provision" (2a).

The Court of Appeals for the Second Circuit undoubtedly in view of the applicable decisions therein rendered and to which reference is hereinafter made in our discussion of the sharp conflict that exists in the various circuits, affirmed without opinion.

REASONS FOR GRANTING THE WRIT

I.

The widespread and irreconcilable conflict that exists among the Circuits as to whether the limited venue provisions of the National Bank Act of 1864 (12 U.S.C. §94) must yield to the special and properly wide venue provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 should be resolved by this Court.

The sharp conflict that exists and which requires resolution is best demonstrated by the forceful and carefully considered opinions rendered on both sides of the question presented. In *Ronson Corp. v. Liquifin Aktiengesellschaft*, 483 F.2d 852 (3 Cir. 1973), the Court was called upon "to resolve the facially conflicting venue provisions of the National Bank Act and those of the Securities Exchange Act of 1934" and noted that "the narrow provisions of the National Bank Act were enforced by the Court of Appeals of the Second Circuit in *Bruns, Nordeman & Company v. The American National Bank and Trust Company*, 394 F.2d 300 (2d Cir. 1968), *cert. denied*, 393 U.S.

855," and also that "[t]he Ninth Circuit came to the same conclusion in *United States National Bank v. Hill*, 434 F.2d 1019 (9th Cir. 1970)." However, as the opinion indicates:

> "District Courts in this circuit have come to different conclusions, *Rome v. Eltra Corp.*, 297 F. Supp. 314 (E.D. Pa. 1969), following the Second Circuit rulings, and *Levin v. Great Western Sugar Company*, 274 F. Supp. 974 (D.C. N.J. 1967), holding that the venue provisions of the Securities Exchange Act should govern" (p. 854).

The Court of Appeals for the Third Circuit found itself "unable to agree" with the Second and Ninth Circuits and concluded that "neither policy nor statutory construction binds us to the restrictive venue requirements of the National Bank Act which first came into being in 1864." The opinion then effectively sets forth the reasons for the Court's refusal to follow the precedents in the Second and Ninth Circuits:

> "We are guided by the realization that the Securities Exchange Act must be liberally interpreted in order to accomplish the congressional objects of regulating the securities market and of affording proper disclosure to the investing public, as well as preventing fraud in securities trading. In recognition of the national rather than local nature of transactions involved, Congress enlarged the applicable venue and service of process requisites. An unduly narrow

> ruling on venue could not but inhibit and reduce the effectiveness of the remedies provided by the Act" (p. 854).

The opinion then highlights the sharp conflict that exists and specifically treats with the varying views presented:

> "The *Bruns* court thought there had been no intent to carve out an exception to the older National Bank Act limitation because there was nothing in the legislative history of the venue provisions of the Securities Exchange Act which indicated any consideration of the status of national banks. We interpret this lack of specific reference in a different fashion and believe that the failure to mention national banks in this setting implies a congressional intent to include them among those governed by the more liberal standards of the Securities Exchange Act. Indeed we note, as did the court in *Levin v. Great Western Sugar Company, supra,* that when it drafted the Act, Congress was aware that certain portions might be construed as applicable to banks and proceeded to make specific provisions for them. The absence of such an exception in the venue section speaks forcefully for the proposition that the banks also were to be affected by its more expansive sweep.

Further evidence that in the securities field Congress intended the special jurisdiction and

venue section of the Act to be complete and exclusive may be found in the fact that power to hear cases arising under the statute was vested in the federal courts only as contrasted with the Banking Act which allowed litigation in state as well as the United States Courts" (p. 854).

That which immediately follows is likewise illuminating:

> "The *Bruns* opinion referred to the cases of *Mercantile National Bank v. Langdeau,* 371 U.S. 555, 83 S. Ct. 520, 9 L. Ed. 2d 523 (1963), and *Michigan National Bank v. Robertson,* 372 U.S. 591, 83 S. Ct. 914, 9 L. Ed. 2d 961 (1963), which dealt with conflicts between state venue acts and the National Banking Act. But in those discussions the Supreme Court was not considering the effect of the special venue section of the Securities Exchange Act. The differences between the two situations are obvious, and we think that the cases cited are not controlling in the present situation" (pp. 854-5).

The Third Circuit refers to the critical treatises on the same subject:

> "Additionally, we are aware that the limited forum provided by the National Banking Act has been the subject of severe criticism. The American Law Institute, *Study Of The Jurisdiction Between State and Federal Courts*

> (1969), recommends repeal saying 'There is no obvious reason why a national bank requires a unique and restrictive venue rule, and cannot be treated as is any other corporation for purpose of venue.' (pp. 412, 413). See also *An Assault On the Venue Sanctuary of National Banks,* 34 George Washington Law Review 765 (1966)" (p. 855).

The Third Circuit accordingly held "that the special and wide venue provisions of the Securities Exchange Act govern in a factual situation where a national bank is party to the action and therefore the District Court properly refused to dismiss the bank" (p. 855). The "hardships sometimes imposed on plaintiffs as a result of this privilege accorded national banks have caused Section 94 to come under severe criticism" (*Southeast Guar. Tr. Co., Ltd. v. Rodman & Renshaw, Inc.,* 358 F. Supp. 1001, 1005.) Indeed Friendly, J., writing in *Bruns,* discussing the foregoing opinion, stated: "We conclude with regret that the rulings upholding the claim of the prevalence of the 1864 Statute are right" (p. 301), although "[i]f we were writing on a clean slate we would not find it difficult to reconcile §94 of the National Bank Act with §22(a) of the Securities Act" (p. 303).

We need but conclude our analysis of the importance of having the issue here presented finally determined in this Court with the following from the opinion in *Carpenter v. Hall,* 352 F. Supp. 856 (S.D. Texas 1972), which refers to the conflicting decisions and notes that "[t]he precise question presented is still open in the Fifth Circuit, but the Court is of the opinion that when the question is raised" in that Circuit, the "Court of

Appeals will adopt the reasoning in *Levin, supra* [274 F. Supp. 974 D.N.J. 1967], and will hold that the 1934 Act controls" (p. 808). Reference is then made to *Lehigh Va. Trust Co. v. Central Nat. Bank of Jacksonville,* 409 F.2d 989, 993 (5th Cir. 1969), which "confirmed the policy of Congress in enacting Section 10(b) and Rule 10b-5" in order to protect interstate commerce and "to protect and make effective the national banking system and the Federal Reserve System and to insure the maintenance of fair and honest markets in such transactions" (p. 809; 15 U.S.C.A. §78b) and proceeds with the following cogent reasoning:

> "In order to implement and enforce the policies of the 1933 and 1934 Acts, Congress has also seen fit to provide, in Section 22(a) and Section 27, respectively, for nationwide service of process and for venue 'in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated' [Section 22(a)] and 'in any such district ['in the district wherein any act or transaction constituting the violation occurred'] or in the district wherein the defendant is found or is an inhabitant or transacts business' (Section 27). The announced policy of Congress in the 1933 and 1934 Acts is, therefore, to provide a convenient forum for suits involving multi-state frauds, no matter how many states the defendants are citizens of or conduct business in. *Clapp v. Stearns & Co.,* 229 F. Supp. 305, 307

> (S.D.N.Y. 1964). See *Hooper, supra,* 282 F.2d at 201. The jurisdictional and venue provisions of the federal securities laws are the teeth for the enforcement of this important legislation" (pp. 809-810).

And further holds:

> "That 12 U.S.C. §94 does not prevail over the venue provisions of the 1933 and 1934 Acts is also supported by an analysis of the intent of Congress in enacting the former. In *First National Bank of Charlotte, North Carolina v. Morgan,* 132 U.S. 141, 10 S. Ct. 37, 33 L. Ed. 282 (1889), Justice Harlan, speaking for the Court, commented on the Congressional intent in enacting the forerunner of 12 U.S.C. §94, as follows:
>
> '. . . This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process from state courts. *First Nat. Bank of Bethel v. Pahquioque Nat. Bank,* [81 U.S.] 14 Wall. 383, 384 [20 L. Ed. 840, 842]; *Crocker v. Marine Nat. Bank,* 101 Mass. 240.'

> "In 1889, the date of the decision in *First National Bank of Charlotte, North Carolina,* the modern facilities for reproduction and transportation could not have been imagined. Today Xerox-type copy machines are as readily available as typewriters, and no two cities are as much as a half a day apart. Moreover the national impact of securities frauds, a by-product of modern communication technology, was already a major threat when Congress passed the 1933 and 1934 Acts" (p. 810).

It is fair to add that *McClung v. LaSalle National Bank of Chicago, Illinois,* 387 F. Supp. 977, S.D. Iowa, 1975, after referring to the judicial "battle lines drawn on this issue" (p. 979) holds to the contrary.

In today's mobile society with banks so frequently crossing district lines to compete and conduct securities related activities it becomes unjust for the innocent victim damaged by the banks in a Florida securities transaction to travel to Oregon to air his suit (with attorney, records and witnesses). This is precisely what the broad venue provisions of the two Securities Acts was designed to insure against.

It is respectfully submitted that enough appears through the quotations from the foregoing opinion to indicate the need for decisive determination by this Court as to which of the judicial paths so effectively hewed must be followed.

CONCLUSION

Rarely has there been presented such prolonged widespread diversity of judicial opinion, on a subject of such supreme business import, which is reflected in the legal treatises. This precise question of venue recurrently arises with completely different impacts upon the litigants involved, dependent upon that judicial forum in which the lawsuits must be begun. The question here presented, therefore, particularly and forcefully commends itself for ultimate determination by this Court.

Respectfully submitted,

s/ Samuel Gottlieb
s/ Ira Jay Sands
Attorneys for Petitioner

On The Brief:
John A. Pickard

APPENDIX A

OPINION OF THE UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 3025 (LFM)

HYMAN RADZANOWER,

Plaintiff,

-against-

TOUCHE, ROSS & CO., et al.,

Defendants.

MacMahon, D.J.:

The within motion, pursuant to Rules 12(b) (2) and (3), Fed. R. Civ. P., for an order dismissing this action as to defendant First National Bank of Boston on the ground of improper venue, is granted.

Absent waiver or consent, a national bank may be sued only in the district in which it is established. 12 U.S.C. Section 94: *Cope v. Anderson*, 331 U.S. 461, 467 (1947); *Klein v. Bower*, 421 F.2d 338, 342 (2d Cir. 1970); *Bruns, Nordeman & Co. v. American Nat'l Bank & Trust Co.*, 394 F.2d 300 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968); *Buffum v. Chase Nat. Bank of City*

Opinion of the United States District Court

of N.Y., 192 F.2d 58 (7th Cir. 1951), *cert. denied*, 342 U.S. 944 (1952). Movant is established in Boston, Massachusetts, within the meaning of 12 U.S.C. Section 94, because its charter specifies Boston as its principal place of business. *Buffum v. Chase Nat. Bank of City of N.Y., supra*, 192 F.2d at 60; *Leonardi v. Chase Nat. Bank of City of N.Y.*, 81 F.2d 19, 22 (2d Cir.), *cert. denied*, 298 U.S. 677 (1936); *Southeast Guaranty Trust Co. v. Rodman & Renshaw, Inc.*, 358 F. Supp. 1001, 1004 (N.D. Ill. 1973); *General Electric Credit Corp. v. James Talcott, Inc.*, 271 F. Supp. 699 (S.D.N.Y. 1966).

Movant's designation of the New York Superintendent of Banks to receive process on its behalf is not a waiver of this venue provision. Although the language of the designation is broad, it specifically evidences an intent to comply with Section 131(c) of the New York Banking Law, which requires such a designation before a foreign bank can operate in a fiduciary capacity in New York. This designation operates as a waiver of the venue provision only in actions involving movant's fiduciary acts in New York, and no such acts are alleged or involved here.

Accordingly, First National Bank of Boston's motion to dismiss this action on the ground of improper venue is granted in all respects.

So ordered.

Dated: New York, N.Y.
October 21, 1974

(Sgd) Lloyd F. MacMahon
United States District Judge

APPENDIX B

JUDGMENT OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

- - - o - - -

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of May, one thousand nine hundred and seventy-five.

PRESENT:

HON. WILLIAM H. MULLIGAN

HON. MURRAY I. GURFEIN
Circuit Judges

HON. MILTON POLLACK
District Judge

Judgment of the United States Court of Appeals

74-2538

Hyman Radzanower,

Plaintiff-Appellant

v.

Touche Ross & Co., Teleprompter Corporation, Jack K. Cooke, Raymond P. Shafer, W.J. Bresnan, B.P. Simon, J.B. Green, L.H. Read, R.G. Wilson, H.E. Flaherty, B.D. Fischman, Berle Adams, Marvin Caron, R.F. Lewis, P.L. Lowe, Charles Luckman, M.B. Mitchell, A.E. Puckett, J.H. Richardson, M.E. Livingston, Jack Wrather, and First National Bank of Boston,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk

Supreme Court, U. S.
FILED
DEC 4 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-268

HYMAN RADZANOWER,

Petitioner,

vs.

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W.J. BRESNAN, H.J. SCHAFLY, LEONARD TOW, R.C. TODD, JR., B.P. SIMON, J.B. GREEN, L.H. READ, R.G. WILSON, H.E. FLAHERTY, B.D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R.F. LEWIS, P.L. LOWE, CHARLES LUCKMAN, M.B. MITCHELL, A.E. PUCKETT, J.H. RICHARDSON, M.E. LIVINGSTON, JACK WRATHER, FIRST NATIONAL BANK OF BOSTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petition for Certiorari Filed August 20, 1975, Certiorari Granted October 20, 1975

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DOCKET ENTRIES

DATE	
7-16-74	Filed Complaint. Issued Summons.
7-17-74	Filed order that Fred Berman of 701 Seventh Avenue, is designated to serve the summons and complaint in the above-entitled action, Clerk.
7-25-74	Filed pltff's affdvt. of Ira Jay Sands and notice of motion for an order for class determination. Ret. 8-6-74.
7-25-74	Filed pltff's memorandum of law in support of motion pursuant to Rule 23, FRCP.
7-30-74	Filed stip & order extending deft. Touche Ross & Co.'s time to answer to 9-4-74. So ordered — Cannella, J.
8-2-74	Filed deft. Touche, Ross & Co.'s notice of taking deposition of pltff on 8-13-74.
8-2-74	Filed deft. Touche, Ross & Co.'s interrogs., first set.
8-5-74	Filed stip and order extending deft. Teleprompter Corp.'s time to answer from 8-4-74 to 9-4-74. So ordered—Cannella, J.

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8-5-74	Filed stip and order that pltff's motion for class determination presently retnble on 8-6-74 is adjourned to 9-6-74. So ordered—Cannella, J.
7-25-74	Filed summons and affdvts. of service of Fred Berman of summons and complaint on defts. T. Ross & Co. on 7-17-74, Teleprompter Corp. on 7-17-74 — B.D. Fishman & C. Luckman both on 7-17-74.
8-13-74	Filed affdvt. of Fred Berman dated 7-17-74 of copy of summons and complaint of Barry Simon.
8-13-74	Filed pltff's notice of taking deposition of deft. Barry P. Simon, etc. on 8-19-74.
8-13-74	Filed pltff's notice to produce documents.
8-15-74	Filed pltff's notice of taking depositions of the named defts. on the dates indicated.
8-15-74	Filed affdvt. of service of Fred Berman of summons & complaint on Marvyn Carton on 7-17-74.
8-19-74	Filed deft. Touche Ross & Co.'s affdvt. of Lawrence R. Eno and notice of motion for an order staying the depositions of all defts. by

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	pltff, including the deposition of deft. Touche Ross & Co., etc., as indicated. Ret. 9-3-74.
8-20-74	Filed deft. The First National Bank of Boston affdvt. of Philip A. Shaver and notice of motion for an order to dismiss as against said deft. Ret. 8-29-74.
8-20-74	Filed memorandum of law in support of the motion of deft. The First National Bank of Boston to dismiss.
8-20-74	Filed pltff's notice of taking deposition of Marvyn Carton on 8-24-74.
8-26-74	Filed pltff's affdvt. of Ira Jay Sands and notice of motion for an order directing the manner in which certain defts. in this action are to be served with the summons and complaint. Ret. 9-4-74.
8-28-74	Filed affdvt. of service of Fred Berman of a copy of the summons and complaint with Barry Simon on 7-17-74 and by service of mail to: Hubert J. Schafly Hugh E. Flaherty Allen E. Puckett John H. Richardson

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9-3-74	Filed deft. Teleprompter Corp.'s affdvt. and show cause order to dismiss complaint and for protective order with a stay. Ret. 9-10-74 at 10:00 a.m. Conner, J.
9-3-74	Filed Memorandum of deft. Teleprompter Corp. in support of motions to dismiss complaint and for protective order and application for stay of discovery.
9-3-74	Filed deft. Touche Ross & Co.'s answering affdvt. of Lawrence R. Eno.
9-3-74	Filed stip & order extending the time for deft. Hubert J. Schafly to answer to 9-24-74. So ordered—Cannella, J.
9-3-74	Filed stip and order-that deft. The First National Bank of Boston's motion to dismiss retnble on 8-29-74 is adjourned to 9-13-74. So ordered—Cannella, J.
9-4-74	Filed memo endorsed on motion filed 8-26-74. Motion denied without prejudice to renewal upon proper papers, pltff having failed to comply with General Rule 9 of this court. So ordered—Cannella, J. (m/n)
9-4-74	Filed Summons and return — served the following:

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First National Bank of Boston by H. James Williams, Jr. on 7-29-74
Raymond P. Shafer on 8-19-74
Jack Wrather by Pamela Smith on 8-8-74

9-5-74	Filed deft. Touche Ross & Co.'s notice of motion for an order, pursuant to Rules 12 (b) and 9 (b) FRCP, dismissing the complaint. Ret. 9-16-74.
9-5-74	Filed memorandum of deft. Touche Ross & Co. in support of motion to dismiss complaint.
9-5-74	Filed affdvt. of Lawrence R. Eno on behalf of deft. Touche Ross & Co. on the motion to dismiss the complaint by deft. Teleprompter Corp.
9-5-74	Filed deft. Touche Ross & Co.'s supplemental answering affdvt. of Lawrence R. Eno on pltff's class action motion.
9-5-74	Filed deft. Teleprompter Corp. affdvt. of Edwin J. Buckingham III in response to pltff's motion for class action determination.
9-9-74	Filed stip & order that all discovery of deft. First National Bank of Boston is adjd until 10 days after date of entry of an order determining the motion of First National to dismiss—Cannella, J.

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9-11-74	Filed response and objections of deft. Touche Ross & Co. to pltff's Notice to produce documents.
9-12-74	Filed Affidavit & Notice of Motion by deft. Hubert J. Schafly for an order dismissing the complaint for failure to state a claim upon which relief can be granted etc. as indicated rtble before Cannella, J. on 9-20-74.
9-12-74	Filed memo in support of motion to dismiss.
9-12-74	Filed Endorsement & order that the within order of Conner, J. is hereby modified and amended so as to stay all discovery by pltff until deft. Teleprompter Corp.'s motion to dismiss the complaint herein is heard and determined. Cannella, J.
9-13-74	Filed Notice of Appearance and Demand that defts. Allen E. Puckett and John H. Richardson hereby appear in this action and that the firm of Milbank, Tweed, Hadley, & McCloy appear as attys for same, and that all papers etc. be served on them.
9-12-74	Filed Endorsement & Order: Pltff's application for the entry of a default judgment is denied against deft. Barry P. Simon. The

Docket Entries

	Court exercises its discretion to renewal at such time as pltff has shown a meritorious basis for this law suit. Application denied without prejudice, Cannella, J. M/N.
9-13-74	Filed stip & order that the date on which defts. Allen E. Puckett & John H. Richardson must answer, etc., is extended to 9-20-74.
9-16-74	Filed stip & order that and agreed by and between counsel, that the return date of all motions now pending before the Court is extended to 9-20-74, in chambers, Cannella, J.
9-19-74	Filed deft's (Marvyn Carton) Notice of Joinder in motion to dismiss the complaint.
9-19-74	Filed pltff's affdvt in opposition to motion of First National Bank of Boston to dismiss.
9-19-74	Filed pltff's memorandum of law in opposition to the motion by deft. to dismiss.
9-20-74	Filed Reply Memorandum of deft. the First National Bank of Boston, in support of its motion to dismiss.
9-23-74	Filed affdvt. of Ira Jay Sands in opposition to motion to dismiss the complaint by deft.'s Touche, Ross & Co., Teleprompter Corp. and H. J. Schafly.

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9-23-74	Filed memorandum of law of pltff in opposition to motions to dismiss.
9-23-74	Filed notice of motion of deft.'s Puckett and Richardson for an order dismissing the complaint. Ret. 9-30-74.
9-23-74	Filed memo of deft.'s Puckett and Richardson in support of above motion.
9-20-74	Filed stip and Order that the return date of various motions pending before the Court (Teleprompter Corp.) are adjourned to 9-20-74. Cannella, J.
9-20-74	Filed stip and order that the return date of various motions now pending etc. (deft. First National Bank of Boston), are adjourned to 9-20-74. Cannella, J.
9-20-74	Filed Affidavit of Service, by Steven L. Kroleski.
9-20-74	Filed Pltff's response to Interrogs.
9-24-74	Filed pltff's notice of motion for order directing service summons and complaint. Ret. 9-25-74.
9-24-74	Filed pltff's memorandum in support of above motion.

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9-24-74	Filed additional affdvt in opposition by pltff to motion to dismiss by First National Bank of Boston.
9-25-74	Filed reply memo in support of motion of deft. H.J. Schafly to dismiss complaint.
9-26-74	Filed notice of reassignment to Judge MacMahon.
9-25-74	Filed Stip & Order that reply papers on deft. Touche Ross's motion to dismiss the complaint be served by 10-7-74.
10-1-74	Filed deft (Puckett & Richardsons') affdvt in opposition to pltff's class action motion.
10-3-74	Filed pltff's affidavit in opposition to Defts. Puckett & Richardson's motion to dismiss the complaint as to them
10-3-74	Filed Memo of Law of Pltff in opposition to motions by defts. to dismiss.
10-3-74	Filed pltff's response to defts. interrogs.
10-4-74	Filed deft. (Touche Ross) reply affdvit. on motion to dismiss.
10-4-74	Filed deft. (Touche Ross) reply memo in support of motion to dismiss the complaint.

Docket Entries

10-7-74	Filed deft (Touche) affdvt & notice of motion compelling pltff to respond to interrogs dated 8-24-74. Ret. 10-11-74.
10-7-74	Filed defts memo of law in support of motion to compel answers.
10-9-74	Filed defts (Shafer & Wrather) affdvt in support of motion to dismiss the complaint.
10-22-74	Filed Memo-Endorsed on motion of 8-20-74. Deft. First National Bank of Boston's motion to dismiss action on ground of improper venue is granted. So Ordered, MacMahon, J. m/n
11-15-74	Filed Pltff's Notice of Appeal to USCA from an Order dated 10-21-74 dismissing this action against deft. First National Bank. Notice Mailed 11-19-74 to: Debevoise, Plimpton, Lyons & Gates of 299 Park Avenue, New York City.
11-19-74	Filed Memo-End on back of motion filed 9-5-74. Motion withdrawn at pre-trial conference held on 10-4-74. So ordered—MacMahon, J.
11-19-74	Filed Memo Endorsed on deft. Touche Ross & Co.'s filed 8-19-74. Motion withdrawn

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	at pre-trial conference held on 10-4-74. So ordered—MacMahon, J.
11-19-74	Filed Memo Endorsed on Pltff's motion filed 9-24-74. Motion withdrawn at pre-trial conference held on 10-4-74. So ordered, MacMahon, J.
11-19-74	Filed Memo Endorsed on Deft.'s Puckett & Richardson, filed 9-23-74. Motion withdrawn at pre-trial conference held on 10-4-74. So ordered, MacMahon, J.
11-19-74	Filed Memo Endorsed on Pltff's motion filed 7-25-74. Motion withdrawn at pre-trial conference held on 10-4-74. So ordered—MacMahon, J.
11-19-74	Filed Memo Endorsed on Deft. Hubert J. Schafly motion filed 9-12-74. Motion withdrawn at pre-trial conference held on 10-4-74. So Ordered, MacMahon, J.
11-19-74	Filed Memo Endorsed on Deft. Marvyn Carton motion filed 9-19-74. Motion withdrawn at pre-trial conference held on 10-4-74. So Ordered—MacMahon, J.
11-19-74	Filed Memo Endorsed on Deft. Touche Ross & Co., motion filed 10-7-74. Motion

withdrawn at pre-trial conference held on 10-4-74. So Ordered—MacMahon, J.

11-19-74 Filed Order of Consolidation of 73 Civ 3929, 73 Civ 4109, 73 Civ 4133, 73 Civ 4895, 74 Civ 3025 (74 Civ 3281 for pre-trial purposes only) & 74 Civ 4341. See 73 Civ 3929 for entry of order. m/n

12-16-74 Filed notice that original record on appeal has been certified and transmitted to the USCA.

5-23-75 Court of Appeals affirmed in open court.

COMPLAINT

(Filed July 16, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HYMAN RADZANOWER,

Plaintiff,

-against-

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W.J. BRESNAN, H.J. SCHAFLY, LEONARD TOW, R.C. TODD, JR., B.P. SIMON, J.B. GREEN, L.H. READ, R.G. WILSON, H.E. FLAHERTY, B.D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R.F. LEWIS, P.L. LOWE, CHARLES LUCKMAN, M.B. MITCHELL, A.E. PUCKETT, J.H. RICHARDSON, M.E. LIVINSTON, JACK WRATHER and FIRST NATIONAL BANK OF BOSTON,

Defendants.

74 Civ. 3025

Plaintiff, for his complaint, by his attorneys, GAINSBURG, GOTTLIEB, LEVITAN & COLE and IRA JAY SANDS, alleges that:

1. This action arises under the Securities Exchange Act of 1934, 15 U.S.C. 78a, *et seq.*, common law, and the laws of New

York State (all collectively called the "act"). This court has jurisdiction pursuant to Section 27 of the Exchange Act, and pendent jurisdiction.

2. Defendants have engaged, are now engaged, and are about to engage in acts and practices which constitute and will constitute violations of the Act, and will, unless restrained and enjoined, continue to engage in the acts and practices set forth in this complaint and acts and practices of similar purport and object.

3. The acts and practices constituting the violations alleged herein occurred within the Southern District of New York and elsewhere.

4. Teleprompter Corporation ("Teleprompter") is a New York corporation with corporate offices at 50 West 44th Street, New York, New York. At all times herein, Teleprompter was an issuer of common stock, registered pursuant to Section 12 of the Exchange Act, 15 U.S.C. 781, and traded on the New York Stock Exchange.

5. Touche, Ross & Co. ("Touche") were the independent auditors for Teleprompter and certified its financial statements hereinafter alleged.

6. First National Bank of Boston ("Boston Bank") is a national banking institution which was related to the violations herein as hereinafter set forth.

7. The other defendants are or were officers and/or directors of Teleprompter, and involved in the said violations.

CLASS ACTION ALLEGATIONS

8. Plaintiff brings this action on behalf of a class herein described pursuant to Rule 23(b) (3) Fed.R.Civ.P.

9. The class consists of all persons who purchased common stock of Teleprompter Corp. during the period in which the violations complained of were committed. There are thousands of members of the class, located in various parts of the United States. Joinder of all members is impracticable. Plaintiff will fairly and adequately protect interests of the class. His claims are typical of claims of all class members. His interest is to obtain relief for himself and for class for the violations herein alleged.

10. A class action is superior to other available methods for fair and efficient adjudication of the controversy.

11. The violations alleged were perpetrated on the class. Each member has sustained damages, too small to make it feasible to institute individual actions.

12. Multiple actions with burdens on the Courts and defendants and dangers to stockholders that the Statute of Limitations may run before they became aware of their rights, should be avoided.

13. It would be impracticable for all stockholders to intervene as parties in this action.

14. The Southern District of New York is the most convenient forum for litigating all claims herein alleged.

15. Plaintiff anticipates no difficulties in the management by this Court of the class action herein.

16. Questions of fact and law common to the class predominate over questions affecting only individual members.

17. The common questions of fact include the accuracy and materiality of the releases and reports of Teleprompter herein alleged and whether they were concealed from the public. Also whether data disseminated by Teleprompter to the public contained untrue statements of material facts and omitted to state material facts necessary to make the statements therein not misleading.

18. The common question of law includes whether the acts herein violated the Act and whether the defendants are liable to the plaintiff and the class.

19. Since on or about January 1, 1973, defendant Teleprompter, directly and indirectly, by use of the means and instrumentalities of interstate commerce and of the mails has employed devices, schemes and artifices to defraud, has made untrue statements of material facts and has omitted to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading, and has engaged in acts, practices and courses of business in connection with the purchase and sale of securities, in violation of the Act.

20. On or about April 1, 1973, defendant Teleprompter filed with the SEC an annual report on Form 10-K including a consolidated balance sheet for the year ended December 31, 1972, distributed such report to its stockholders and disseminated it among the investing public. Such reports state as assets plant, property and equipment at year-end December 31, 1972, valued at $180,362,075, and the same at year-end December 31, 1971, were valued at $113,885,737. Note 1 to the financial statements disclosed that "The Corporation records additions to plant, property and equipment at cost which includes amounts for materials and applicable labor, overhead and interest." Note 5 disclosed that during years ended December 31, 1972 and 1971, respectively, interest aggregating approximately $3.2 million and $1.6 million had been capitalized as a cost of construction.

21. Said report is false and misleading in that it fails to state that capitalized overhead costs included in valuation of plant, property and equipment constituted approximately $17 million, which fact was material in that Teleprompter reasonably should have known that a reduction in its construction program was likely and a substantial amount of such capitalized overhead costs would have to be charged against revenues, thus adversely affecting future earnings.

22. During 1973, Teleprompter made statements and issued releases and reports regarding anticipated growth of future earnings, its expanded program for contruction of facilities, financial strength based upon a $150 million revolving credit and term loan obtained as of approximately April 26, 1973,

development of new programs, and possibility of external growth through acquisitions.

23. From and after on or about January 1, 1973, Teleprompter's management knew or reasonably should have known that its internal financial controls and procedures were inadequate to provide accurate and timely budgets, results of operations reports, and projections of costs and revenues for its new acquistions and its existing systems.

24. On or prior to June 7, 1974, defendants were aware of potential business problems in that, among other things, the rate of Teleprompter's expenditures would deplete a $150 million line of revolving and term credit obtained as of April 26, 1973 by the first quarter of 1974, whereas it was intended that such credit be sufficient for financing construction programs through December 31, 1974; that Teleprompter had then and in the future would have cash flow problems; that without sufficient funds construction would halt; that the halt in such construction activity, under Teleprompter's then current accounting policies, would adversely affect Teleprompter's earnings; that Teleprompter would be "unprofitable" and might realize a net loss in 1973; and construction should be slowed to preserve available funds. Teleprompter's management was advised shortly thereafter that earnings for the second quarter of 1973 would not be as high as those for the first quarter of 1973.

25. Notwithstanding management's awareness of such problems, and notwithstanding that such problems were under consideration, on or about July 12, 1973, Teleprompter issued a

press release which announced that as a result of an accelerated expansion program second quarter earnings per share were expected to be lower than those of first quarter of 1973, that the company was in the midst of its building years, and that the company planned to take down the remainder of a $150 million bank credit line in 1973 and 1974 to finance its construction and expansion program. Such release was false and misleading in that at such time, Teleprompter knew or reasonably should have known that a reduction in its construction program was likely and that substantial amounts of capitalized overhead costs would have to be charged against revenues, thus adversely affecting future earnings, and Teleprompter was experiencing other financial problems.

26. On or about August 6, 1973 Teleprompter issued a press release which re-confirmed that statement in the July 12, 1973 press release that Teleprompter was in the midst of its building years and stated that Teleprompter was now charging a lower percentage of certain expenditures to capital and deferred accounts than theretofore and charging a greater percentage of such items to expenses for the first six months ended June 30, 1973 than was charged in the first quarter of 1973, and, as a result earnings were 6 cents per common and common equivalent share in the second quarter of 1973 as compared with 22 cents per common and common equivalent share in the first quarter of 1973. Such release was false and misleading in that, at such time, Teleprompter knew or reasonably should have known that a reduction in its construction program was likely and that substantial amounts of capitalized overhead costs would be charged against revenues, adversely affecting future earnings, and Teleprompter was experiencing other financial problems.

27. On a number of occasions between June 7, 1973 and September 4, 1973, officers and directors of Teleprompter received information, engaged in discussions and meetings and made decisions relating to necessity of conserving cash and curtailing Teleprompter's construction program, and relating to the impact that such actions would have upon Teleprompter's financial condition and earnings.

28. At a meeting of the Board of Directors of Teleprompter on or about August 13, 1973, the Board was informed that Teleprompter's operations were at a cash-even basis and as a result, Teleprompter's construction of cable television franchises was being financed by funds obtained under the $150 million bank credit. It has been anticipated that Teleprompter would have a positive cash low. The Board, at such meeting, approved a program designed to attain the budgeted revenue projection for 1973 by increasing the number of subscribers to cable television systems and reducing construction costs by curtailing construction and reviewing the entire construction program to ascertain for which systems construction could be deferred until 1974.

29. On or about August 24, 1973, Todd met with a vice president of the First National Bank of Boston, Teleprompter's agent bank in a $150 million Revolving and Term Credit Agreement dated as of April 26, 1973, at which time cash flow figures, proposed curtailment of the construction program and earnings were discussed.

30. By letter of August 28, 1973 the Bank vice president communicated with Todd in which he noted that the foundation

of the loans was predicated on the cash flow of Teleprompter, and suggested that as a result of the marked difference in cash flow between figures shown him on August 24, 1973, and those originally provided the bank, Teleprompter had a cash flow problem immediately. The Bank's vice president acknowledged certain steps he understood Teleprompter seriously considered implementing as follows: (a) cutting back construction expenditures wherever possible and practical; (b) reducing overhead expenditures; and (c) considering possibility of disposing of assets of subsidiaries which are unprofitable cash users.

31. On or about August 30, 1973, the Bank vice president requested that directors of Teleprompter be polled to determine whether the program, as outlined in the aforementioned letter of August 28, 1973, and as submitted by Todd to the Bank, was authorized by Teleprompter Board of Directors. The proposals contained in the August 28, 1973 letter were unanimously approved by Teleprompter's board of directors as indicated in a letter from the Secretary of Teleprompter confirming such vote by the Teleprompter's board of directors.

32. On or about August 24, 1973, Teleprompter requested from the Bank an advance of $12 million under the Revovling and Term Credit Agreement but delivery of funds was deferred until all of the banks party to the agreement had been informed of the then condition of Teleprompter, of its program to curtail construction and improve its financial condition, and of a possible default by Teleprompter under the lending agreement.

33. On or about September 4, 1973, Teleprompter issued a press release "concerning rumors circulating about adverse corporate developments" in which the company stated:

> "We categorically deny that there are any unannounced adverse developments concerning Teleprompter's business, assets, or earnings.
>
> "Teleprompter is in the midst of the largest construction program in its history. Record high interest costs and a lower rate of gaining new subscribers in relation to the growing number of homes behind cable have led management to temporarily suspend about 20 percent of its 1973 construction program and to review the entire construction program.
>
> "Teleprompter's current priority is to add new subscribers to existing cable systems where construction during the past year outpaced subscriber additions."

34. Such press release issued on September 4, 1973, was materially false and misleading in that it failed to disclose that Teleprompter was experiencing cash flow problems, that a request for a drawdown of funds under the $150 million agreement had been deferred at the request of the Bank, the impact or estimate of the effect the curtailment in construction would have on future income and earnings, probability that investments in certain cable systems would be written down due

to curtailment of construction, and that increased expenses would be incurred from a new marketing program to obtain new subscribers.

35. Each of the defendants as hereinbefore described, aided and abetted Teleprompter and the other defendants and/or joined and participated in the one continuous course of conduct and plan and scheme to eliminate knowledge of the problems of Teleprompter from the investing public. Each of the defendants actively participated in the violations hereinbefore alleged and adopted by action and by inaction the violations committed by each of the defendants hereto.

36. Defendant, Touche, as independent auditors for Teleprompter, wantonly disregarded its obligation to the public to expeditiously bring to the attention of the SEC and the New York Stock Exchange and the public, the fact that the financial condition and cash available and working capital and cash flow of Teleprompter were such that the financial statements issued by Teleprompter were misleading and omitted material disclosures. With knowledge of such falsity of Teleprompter's financial statements, Touche nevertheless approved such statements, gave the reputation of its name and authority to Teleprompter and to such financial statements, thus causing the public to be misled and resulting in the loss of plaintiff.

37. Defendant, Boston Bank, as afore-described, knew full well of the violations afore-described and failed to bring them to the attention of the SEC and the New York Stock Exchange, and to inform the public thereof, despite the fact that in

performing its function on behalf of and together with Teleprompter, Boston Bank entered into fiduciary obligations to the investing public and particularly to the stockholders of Teleprompter and to the plaintiff.

38. Plaintiff and the members of the class and the investing public were ignorant of the fact that the press releases, financial statements and other reports issued by Teleprompter as aforedescribed, were materially false and misleading in the respects so described. Plaintiff and said other persons traded in the securities of Teleprompter in reliance upon the accuracy, completeness and forthrightness of the statements so distributed by the defendants and were damaged by the said conduct in an amount presumably unknown to the plaintiff.

39. As a result of the actions aforedescribed, defendants have committed a common-law fraud upon the plaintiff and members of the class and have likewise violated the statutes of the State of New York respecting said activities.

40. Said activities of the defendants were committed in a wanton and malicious manner and constituted fraud upon the public generally, and a violation of the business ethics required of such defendants.

WHEREFORE, Plaintiff demands judgment:

1. Determining that this action be maintained as a class action.

2. Determining that plaintiff and the members of the class have judgment against defendants and each of them in amount sufficient to compensate for the damages incurred, with proper interest thereon.

3. Enjoining defendants and any other person acting in active concert or participation with them, in connection with the purchase and sale of Teleprompter securities and any other security, from further acts and practices in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated by the SEC thereunder.

4. Granting to plaintiff and members of the class punitive and exemplary damages in the sum of $1 Million.

5. Granting to plaintiff the costs and expenses of this action, including reasonable attorneys and accountants fees.

6. Granting such other and further relief as this Court may deem appropriate.

IRA JAY SANDS
By:

(Sgd.) Ira Sands
Attorney for Plaintiff
Office and Post Office Address

701 Seventh Avenue
New York, New York 10036
(212) 265-3500

AND

SAMUEL GOTTLIEB
GAINSBURG,
GOTTLIEB, LEVITAN & COLE
Co-Counsel for Plaintiff
122 East 42nd Street
New York, New York 10017
(212) 697-3440

EXHIBIT — COMPLAINT FOR PERMANENT INJUNCTION ANNEXED TO FOREGOING COMPLAINT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

- against -

TELEPROMPTER CORPORATION,

Defendant.

Civil Action No.

The United States Securities and Exchange Commission ("Commission") the plaintiff herein, for its complaint alleges that:

1. This action arises under the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78a, *et seq.*, and this court has jurisdiction of this action pursuant to Section 27 of the Exchange Act, 15 U.S.C. 78aa.

2. The defendant has engaged, is engaged, and is about to engage in acts and practices which constitute and will constitute violations of Sections 10(b) and 13(a) of the Exchange Act, 15

Exhibit — Complaint for Permanent Injunction Annexed to Foregoing Complaint

U.S.C. 78j(b) and 78m(a), Rules 10b-5, 12b-20 and 13a-1, 17 CFR 240.10b-5, 240.12b-20 and 240.13a-1, and Rule 3-06 of Regulation S-X, 17 CFR 210.3-06, promulgated thereunder.

3. The defendant will, unless restrained and enjoined, continue to engage in the acts and practices set forth in this complaint and acts and practices of similar purport and object.

4. The acts and practices constituting the violations alleged herein have occurred within the jurisdiction of the United States District Court for the Southern District of New York and elsewhere.

5. Pursuant to authority conferred on the Commission by Sections 10(b), 12(b) and 13(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78j(b), 78l(b) and 78m(a)], the Commission has promulgated Rules 10b-5, 12b-20, 13a-1 and Rule 3-06 of Regulation S-X (17 CFR 240.10b-5, 240.12b-20, 240.13a-1 and 17 CFR 240.3-06), such rules and regulations being in effect at all times mentioned herein and at the present time.

6. Teleprompter Corporation ("Teleprompter") is a New York corporation having its corporate offices at 50 West 44th Street, New York, New York. At all times relevant herein Teleprompter was an issuer of common stock, a class of equity security registered pursuant to Section 12 of the Exchange Act, 15 U.S.C. 781, and traded on the New York Stock Exchange, a national securities exchange registered with the Commission pursuant to Section 6 of the Exchange Act, 15 U.S.C. 78f.

Exhibit — Complaint for Permanent Injunction Annexed to Foregoing Complaint

CAUSE OF ACTION

[Sections 10(b) and13(a) of the Exchange Act, 15 U.S.C. 78j(b) and 78m(a), and Rules 10b-5, 12b-20 and 13a-1, 17 CFR 240.10b-5, 240.13a-1, 240.12b-20 and Rule 3-06 of Regulation S-X, 17 CFR 210.3-06]

7. Paragraphs 1 through 6 are realleged and incorporated herein by reference.

8. Since on or about January 1, 1973, defendant Teleprompter, directly and indirectly, by use of the means and instrumentalities of interstate commerce and of the mails has employed devices, schemes and artifices to defraud, has made untrue statements of material facts and has omitted to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading, and has engaged in acts, practices and courses of business in connection with the purchase and sale of securities, in violation of Sections 10(b) and 13(a) of the Exchange Act and Rules 10b-5, 12b-20 and 13a-1 thereunder and Rule 3-06 of Regulation S-X, as more particularly described below.

9. On or about April 1, 1973, defendant Teleprompter filed with the Commission an annual report on Form 10-K including a consolidated balance sheet for the year ended December 31, 1972, distributed such report to its stockholders and disseminated it among the investing public. Such report states as

Exhibit — Complaint for Permanent Injunction Annexed to Foregoing Complaint

assets plant, property and equipment at year-end December 31, 1972 valued at $180,362,075, and the same at year-end December 31, 1971 were valued at $113,885,737. Note 1 to the financial statements disclosed that "The Corporation records additions to plant, property and equipment at cost which includes amounts for materials and applicable labor, overhead and interest." Note 5 disclosed that during the years ended December 31, 1972 and 1971, respectively, interest aggregating approximately $3.2 million and $1.6 million had been capitalized as a cost of construction.

10. The above described report is false and misleading in that it fails to state that capitalized overhead costs included in its valuation of plant, property and equipment constituted approximately $17 million, which fact was material in that Teleprompter reasonably should have known that a reduction in its construction program was likely and that a substantial amount of such capitalized overhead costs would have to be charged against revenues, thus adversely affecting future earnings.

11. During 1973, Teleprompter made statements and issued press releases and reports regarding anticipated growth of future earnings, its expanded program for construction of facilities, financial strength based upon a $150 million revolving credit and term loan obtained as of approximately April 26, 1973, development of new programs, and the possibility of external growth through acquisitions.

Exhibit — Complaint for Permanent Injunction Annexed to Foregoing Complaint

12. From on or about January 1, 1973, Teleprompter's management knew or reasonably should have known that its internal financial controls and procedures were inadequate to provide accurate and timely budgets; results of operations reports, and projections of costs and revenues for new acquisitions and existing systems.

13. On or prior to June 7, 1974, Teleprompter's management was aware of potential business problems in that, among other things, the rate of Teleprompter's expenditures would deplete a $150 million line of revolving and term credit obtained as of April 26, 1973 by the first quarter of 1974, whereas it was intended that such credit be sufficient for financing construction programs through December 31, 1974; that Teleprompter had then and in the future would continue to have cash flow problems; that without sufficient funds the construction program would halt; that the halt in such construction activity, under Teleprompter's then current accounting policies, would adversely affect Teleprompter's earnings; that Teleprompter would be "unprofitable" and might realize a net loss in 1973; and that construction should be slowed so as to preserve available sources of funds. Teleprompter's top managment was also advised shortly thereafter that earnings for the second quarter of 1973 would not be as high as those for the first quarter of 1973.

14. Notwithstanding management's awareness of such problems, and notwithstanding that such problems were under consideration, on or about July 12, 1973, Teleprompter issued a

press release [attached as Exhibit I] which announced, among other things, that as a result of an accelerated expansion program second quarter earnings per share were expected to be lower than those of the first quarter of 1973, that the company was in the midst of its building years, and that the company planned to take down the remainder of a $150 million bank credit line in 1973 and 1974 to finance its construction and expansion program. Such release was false and misleading in that, at such time, Teleprompter knew or reasonably should have known that a reduction in its construction program was likely and that substantial amounts of capitalized overhead costs would have to be charged against revenues, thus adversely affecting future earnings, and that Teleprompter was experiencing other financial problems.

15. On or about August 6, 1973, Teleprompter issued a press release [attached as Exhibit II] which, among other things, re-confirmed the statement in the July 12, 1973 press release that the company was in the midst of its building years and stated that the company was now charging a lower percentage of certain expenditures to capital and deferred accounts than theretofore and charging a greater percentage of such items to expenses for the first six months ended June 30, 1973 than was charged in the first quarter of 1973, and, as a result earnings were 6 cents per common and common equivalent share in the second quarter of 1973 as compared with 22 cents per common and common equivalent share in the first quarter of 1973. Such release was false and misleading in that, at such time, Teleprompter knew or reasonably should have known that a

reduction in its contruction program was likely and that substantial amounts of capitalized overhead costs would have to be charged against revenues, thus adversely affecting future earnings, and that Teleprompter was experiencing other financial problems.

16. On a number of occasions between June 7, 1973 and September 4, 1973, officers and directors of Teleprompter received information, engaged in discussions and meetings and made decisions relating to the necessity of conserving cash and curtailing Teleprompter's construction program, and relating to the impact that such actions would have upon the financial condition and earnings of Teleprompter.

17. At a meeting of the Board of Directors of Teleprompter on or about August 13, 1973 the Board was informed that the corporation's operations were at a cash-even basis and as a result the corporation's construction of cable television franchises was being financed by funds obtained under the $150 million bank credit. It had been anticipated that the corporation would have a positive cash flow. The Board, at such meeting, approved a program designed to attain the budgeted revenue projection for 1973 by, among other things, increasing the number of subscribers to cable television systems and reducing construction costs by curtailing construction and reviewing the entire construction program to ascertain for which systems construction could be deferred until 1974.

18. On or about August 24, 1973, Robert C. Todd, vice president and treasurer of Teleprompter, met with a vice

president of the First National Bank of Boston, Teleprompter's agent bank in a $150 million Revolving and Term Credit Agreement dated as of April 26, 1973, at which time cash flow figures, proposed curtailment of the construction program and earnings were discussed.

19. By letter of August 28, 1973 [attached as Exhibit III] the vice president of First National Bank of Boston communicated with Todd in which, among other things, he noted that the foundation of the loans was predicated on the cash flow of the company, and suggested that as a result of the marked difference in cash flow between the figures shown him on August 24, 1973 and those originally provided the bank, Teleprompter had a cash flow problem to deal with immediately. The Bank's vice president acknowledged certain steps he understood Teleprompter "seriously considers implementing" to deal with such problem as follows: (1) cutting back construction expenditures wherever possible and practical; (2) reducing overhead expenditures; and (3) considering the possibility of disposing of assets or subsidiaries which are unprofitable or cash users.

20. On or about August 30, 1973, the vice president of the First National Bank of Boston requested that the directors of Teleprompter be polled to determine whether the program, as outlined in the aforementioned letter of August 28, 1973 and as submitted by Todd to the First National Bank of Boston, was authorized by Teleprompter's Board of Directors. The proposals contained in the August 28, 1973 letter were unanimously

approved by the Teleprompter board of directors as indicated in the attached letter from the Secretary of Teleprompter confirming such vote by the board of directors of Teleprompter [Exhibit IV].

21. On or about August 24, 1973, Teleprompter requested from First National Bank of Boston an advance of $12 million under the April 26, 1973 Revolving and Term Credit Agreement but delivery of funds was deferred until all of the banks party to the lending agreement had been informed of the then financial condition of Teleprompter, of its program to curtail construction and improve its financial condition, and of a possible technical default by Teleprompter under the lending agreement.

22. On or about September 4, 1973, Teleprompter issued a press release "concerning rumors circulating about adverse corporate developments" [attached as Exhibit V] in which the company stated:

> "We categorically deny that there are any unannounced adverse developments concerning Teleprompter's business, assets or earnings.
>
> "Teleprompter is in the midst of the largest construction program in its history. Record high interest costs and a lower rate of gaining new subscribers in relation to the growing number of homes behind cable have led management to

Exhibit — Complaint for Permanent Injunction Annexed to Foregoing Complaint

temporarily suspend about 20 percent of its 1973 construction program and to review the entire construction program.

"Teleprompter's current priority is to add new subscribers to existing cable systems where construction during the past year outpaced subscriber additions."

23. Such press release issued on September 4, 1973 was materially false and misleading in that, among other things, it failed to disclose that Teleprompter was experiencing cash flow problems, that a request for a drawdown of funds under the $150 million bank credit agreement had been deferred at the request of the lead bank to such agreement, the impact or estimate of the effect the curtailment in construction would have on future income and earnings, the probability that investments in certain cable systems would be written down due to the curtailment of construction, and that increased expenses would be incurred from a new marketing program to obtain new subscribers.

24. In view of the foregoing, unless restrained and enjoined, defendant Teleprompter will continue to violate Sections 10(b) and 13(a) of the Exchange Act and Rules 10b-5, 12b-20 and 13a-1 and Rule 3-06 of Regulation S-X.

WHEREFORE, Plaintiff demands judgment:

Exhibit — Complaint for Permanent Injunction Annexed to Foregoing Complaint

1. Enjoining defendant Teleprompter and its officers, partners, agents, servants, employees and any other person acting in active concert or participation with it, in connection with the purchase and sale of Teleprompter securities and any other security, from further acts and practices in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated by the Commission thereunder, including the dissemination of false and misleading reports and financial statements to shareholders and the investing public, and issuance of false and misleading press releases and public statements.

2. Enjoining defendant Teleprompter and its officers, partners, agents, servants, employees and any other person acting in active concert or participation with it from filing reports and financial statements with the Commission which are materially false and misleading in violation of Sections 10(b) and 13(a) of the Securities Exchange Act of 1934 and Rules 10b-5, 12b-20, 13a-1 and Rule 3-06 of Regulation S-X promulgated by the Commission thereunder.

3. For such and further relief as this Court may deem necessary and appropriate.

Respectfully submitted,

RICHARD S. KRAUT
Assistant Director

CHARLES LERNER
Attorney

Exhibit — Complaint for Permanent Injunction Annexed to Foregoing Complaint

William D. Moran,
Regional Administrator
Securities and Exchange
Commission
26 Federal Plaza
New York, New York
Telephone: (212) 264-1636

Dated: June , 1974

EXHIBIT — TELEPROMPTER NEWS RELEASE DATED JULY 12 ANNEXED TO FOREGOING COMPLAINT

Teleprompter Corporation
50 West 44th Street
New York, New York 10036
Telephone 212-966-7500

For further information
please contact

Don Witheridge

For Immediate Release

New York, July 12 — Teleprompter Corporation announced today that its accelerated expansion program in major CATV markets is expected to result in second quarter earnings per share lower than those of the first quarter of 1973.

Governor Raymond P. Shafer, Chairman and Chief Executive Officer, said "the Company's operations continue to be highly profitable, and income from service for CATV and for the Company as a whole continues to grow.

"The Company," he said, "is now in the midst of its building years. By August 1, Teleprompter will have more than two million homes behind cable, more than twice that of any other company in the cable industry.

"We have taken down $85 million of a $150 million bank credit line", he added, "and plan to take down the remainder this

Exhibit — Teleprompter News Release Dated July 12 Annexed to Foregoing Complaint

year and next to finance our continued record construction and expansion program. This program is our investment in a profitable future. During the period when construction outpaces subscriber additions, a slower earnings-per-share growth-rate may be experienced."

As of June 30, 1973, Teleprompter had 818,716 subscribers with 1,909,489 homes behind cable (a penetration of 42.9 percent) compared with 672,834 subscribers and 1,441,511 homes behind cable (a penetration of 46.7 percent) on June 30, 1972. This represents a 21.7 percent increase in subscribers and a 32.5 percent increase in homes behind cable.

Including franchises recently obtained, Teleprompter now has approximately 4,000,000 homes in its franchise areas located in 34 states.

tpt

73/162

EXHIBIT — TELEPROMPTER NEWS RELEASE DATED AUGUST 6 ANNEXED TO FOREGOING COMPLAINT

Teleprompter Corporation
50 West 44th Street
New York, New York 10036
Telephone 212-966-7500

For further information
please contact

Don Witheridge

For Immediate Release

New York, August 6 — Teleprompter Corporation reported today that for the first half of 1973, unaudited net income was $4,758,000, or 28¢ per common and common equivalent share, on revenues of $34,242,000 as compared with unaudited net income of $6,011,000, or 41¢ per common and common equivalent share, on revenues of $29,446,000 for the first half of 1972.

For the second quarter of 1973, unaudited net income was $977,000 or 6¢ per common and common equivalent share on revenues of $17,855,000 as compared with unaudited net income of $3,247,000, or 22¢ per common and common equivalent share, on revenues of $15,060,000 for the second quarter of 1972.

Unaudited net income for the first quarter of 1973 was $3,781,000, or 22¢ per common and common equivalent share,

Exhibit — Teleprompter News Release Dated August 6 Annexed to Foregoing Complaint

on revenues of $16,388,000 as compared with unaudited net income of $2,764,000 or 19¢ per common and common equivalent share, on revenues of $14,385,000 for the first quarter of 1972. The adjustment of per share earnings for the first quarter of 1973 to 22¢ from the 24¢ previously reported reflects the accounting treatment, in accordance with APB 15, of certain contingent shares which at the market price on June 30, 1973 Teleprompter would have been required to issue in connection with prior acquisitions.

The decline in 1973 first half net income, said Raymond P. Shafer, Chairman and Chief Executive Officer, is attributable to a number of factors. These include a substantial increase in depreciation and amortization over the first half of 1972 — primarily as a result of accelerated construction of CATV systems, the impact of new CATV systems becoming "operational," increased expenses for local program origination and higher electronic data processing expenses.

As reported on July 12, Teleprompter is in the midst of its building years, a period when construction outpaces subscriber additions and, during this period, slower earnings-growth may be experienced. In the past two years, Teleprompter has spent more than $100,000,000 on additions to its cable plant. A lower penetration level of 42.9 percent at June 30, 1973 — 818,716 subscribers with 1,909,489 homes behind cable — as compared with a 46.7 percent level on June 30 a year ago — 672,834 subscribers with 1,441,511 homes behind cable — has adversely affected earnings during the current year to date.

Exhibit — Teleprompter News Release Dated August 6 Annexed to Foregoing Complaint

The expenses incurred in connection with local program origination are primarily "start-up." They provide a foundation for sales of advertising, particularly in systems which have sizeable viewing audiences, and they put Teleprompter in a position to comply with present and future federal and local CATV regulations concerning local origination of programs. The expenses incurred for expanded data processing capacity now enable Teleprompter to service foreseeable growth in customer accounts and to provide ancillary services and billing for Pay TV.

A significant addition to plant resulted from Teleprompter's bringing 20 CATV systems — three of them acquired — into an "operational" status in the first half of the year as compared with only one system becoming "operational" during all of 1972. A new cable system is considered "operational" 18 months after the first subscriber installation or when 25 percent of the homes in the franchise area are connected, if earlier. During the preoperational period, operating losses incurred are deferred and amortized over a 10 year period. This method of determining when a system becomes operational was adopted some years ago on the assumption that a system would reach the break-even point when it becomes operational. Although recent experience indicates that a longer period may be required, particularly in major urban markets, to reach the break-even point, Teleprompter is continuing to use the same method of determining when a system becomes operational. During the first half of 1973 an unprecedented number of systems became operational, which had a substantial negative effect on reported earnings in that period. By reason of the continued progress of

Exhibit — Teleprompter News Release Dated August 6 Annexed to Foregoing Complaint

the company and the much smaller number of systems becoming operational in the second half of 1973, management anticipates better earnings in the second half of the year.

In view of the large number of new systems which became operational during 1973 and the current status of the construction progress and other items enumerated above, management recently reviewed its procedures for charging certain expenditures to capital and deferred accounts. In light of presently available information, management decided, within the framework of its established accounting policies, to charge a greater percentage of such items to expenses for the six months ended June 30, 1973 than was charged in the first quarter of 1973. The full impact of such increase in charges to expenses for the first half of 1973 is reflected in 1973 second quarter earnings. Management's decision, and the resultant substantially reduced second quarter 1973 earnings, stem from its conclusion that adjustments to interim earnings should be made as additional information about operations becomes available in order to minimize year-end adjustments.

If the decision to increase current expense charges were applied to earnings for the first quarter of 1973, management estimates the 1973 second quarter earnings would have been approximately 15¢ per common and common equivalent share, with a corresponding decrease 1973 first quarter earnings.

tpt

73/177

* * *

EXHIBIT — LETTER DATED AUGUST 28, 1973 FROM THE FIRST NATIONAL BANK OF BOSTON TO TELEPROMPTER CORPORATION ANNEXED TO FOREGOING COMPLAINT

RECEIVED
G 30 19
R.C. TODD, JR.
August 28, 1973

Ira Stepanian
Vice President

Mr. Robert C. Todd
Vice President, Finance
Teleprompter Corporation
50 West 44th Street
New York, New York 10036

Dear Bob:

Thank you for reviewing with us the revised cash flow figures on Friday, August 24. The data that you presented to us was most informative in that it detailed a number of aspects of cash flow which had been omitted in previously submitted figures and were not, in my opinion, already presented in those public documents which have been available up to this point. This revised format of information should continue to be made available to us on a regular basis. As you know, the foundation of our loans had been, and still is, predicated on the cash flow of the Company. The marked difference in cash flow between the new figures and those originally provided us clearly indicate that

Exhibit — Letter Dated August 28, 1973 from The First National Bank of Boston to Teleprompter Corporation Annexed to Foregoing Complaint

the Company has a problem which should be dealt with immediately. I understand, however, that the Company intends to seriously consider implementing the following steps.

1. Cut back construction expenditures wherever possible and practical.

2. Eliminate all acquisitions requiring cash outlays or assumption of debt or which would require net outflows of cash for construction.

3. Place limits on the type and extent of new franchise solicitations.

4. Reduce overhead expenditures.

5. Consider the possibility of disposing of assets or subsidiaries which are unprofitable or cash-users.

As Agent Bank in the Revolving and Term Credit Agreement dated as of April 26, 1973, we will endeavor to work with you in resolving the problem, but our task in doing so will be greatly facilitated if we can assure the banks that you will take immediate steps to implement the above program. I would appreciate your documenting your actions in this regard.

If you have any questions, or wish to discuss the outlined program in more detail, please feel free to contact me. Please

Exhibit — Letter Dated August 28, 1973 from The First National Bank of Boston to Teleprompter Corporation Annexed to Foregoing Complaint

advise me also of your time availability in order that the information you have provided us can be presented to the other participants in the Credit.

Sincerely

s/ Ira Stepanian
Ira Stepanian
Vice President

cc: Mr. Raymond P. Shafer, Chairman of the Board
Mr. William J. Bresnan, President
Mr. Marvyn Carton, Chairman, Finance Committee

EXHIBIT — MEMORANDUM TO DIRECTORS BY SHEA, GOULD, CLIMENKO & KRAMER ANNEXED TO FOREGOING COMPLAINT

SHEA, GOULD, CLIMENKO & KRAMER

330 Madison Avenue

New York, New York 10017

September 4, 1973

MEMORANDUM TO DIRECTORS

On Thursday, August 30th, Ira Stepanian, Vice-President, The First National Bank of Boston ("Bank"), orally requested Robert C. Todd, Vice-President — Finance and Treasurer, to conduct a telephone poll of the Directors. The stated purpose of the requested poll was to determine whether in the opinion of the individual directors, the program submitted on August 30th to the Bank by Mr. Todd with the concurrence of Messrs. Shafer and Bresnan, in response to the letter of the Bank dated August 28th (Exhibit 1 hereto), requesting a documented reply was authorized by the Board of Directors at its August 13th meeting. A copy of the undated written program submitted by Mr. Todd in response to the Bank's request is annexed as Exhibit 2.

Item 2 of the Bank's letter (Exhibit 1) with respect to acquisitions was not covered by the program submitted to the Bank (Exhibit 2) for the reason that the Bank had previously

advised the Corporation that in accordance with the provisions of the Credit Agreement, the Bank's consent was necessary for acquisitions which in the aggregate exceeded $10,000,000 since December 31, 1972, and since that limit had already been reached by acquisitions previously approved by the Board, the Bank requested additional data including cash flow projections before reviewing any request for consent to exceed such limit.

Item 3 of the Bank's letter (Exhibit 1) with respect to new franchise solicitations was not covered by the program submitted to the Bank (Exhibit 2) for the reason that the Bank had earlier been informed that criteria for new franchise applications were under review as well as alternative financing via limited partnerships which did not require the credit of the Corporation (August 15 Draft of Minutes of Board meeting of August 13, 1973 pages 10, 21 and 23).

On Thursday, August 30th and Friday, August 31st, at the request of Mr. Todd, the undersigned and Mr. Todd contacted each of the directors, with the exception of Mr. Wrather on whose behalf Mr. Livingston spoke. The directors individually and unanimously concurred that the program submitted by management to the Bank was within the scope of the authorization given to management at the August 13th meeting.

Mr. Lowe requested that the minutes of the polling reflect his comment that although he concurs in the statement that management was authorized by the prior actions of the Board, to submit the program to the Bank, and although he appreciates

Exhibit — Memorandum to Directors by Shea, Gould, Climenko & Kramer Annexed to Foregoing Complaint

that the program does not purport to carry Board approval for any of the amounts stated therein, that by reason of prior experience with data requested of and furnished by management to the Board, in his view management should submit to the Board the basis for the proposed reduction in construction expenditures so that the Board can determine whether the program has its approval.

s/ Bernard D. Fischman

EXHIBIT — TELEPROMPTER NEWS RELEASE DATED SEPTEMBER 4 ANNEXED TO FOREGOING COMPLAINT

Teleprompter Corporation
50 West 44th Street
New York, New York 10036
Telephone 212-986-7500

For further information
please contact

Don Witheridge

For Immediate Release

New York, September 4 — Teleprompter Chairman and Chief Executive Officer Raymond P. Shafer made the following announcement concerning rumors circulating about adverse corporate developments.

"We categorically deny that there are any unnannounced adverse developments concerning Teleprompter's business, assets or earnings.

"Teleprompter is in the midst of the largest construction program in its history. Record high interest costs and a lower rate of gaining new subscribers in relation to the growing number of homes behind cable have led management to temporarily suspend about 20 percent of its 1973 construction program and to review the entire construction program.

Exhibit — Teleprompter News Release Dated September 4 Annexed to Foregoing Complaint

"Teleprompter's current priority is to add new subscribers to existing cable systems where construction during the past year outpaced subscriber additions.

"As a result of its expanded construction program Teleprompter at August 31, 1973 had cable behind approximately 2 million homes in its franchised areas and had approximately $50,000 primary subscribers."

tpt

73/174

EXHIBIT — CONSENT JUDGMENT ANNEXED TO FOREGOING COMPLAINT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

- vs -

TELEPROMPTER CORPORATION,

Defendant.

CIVIL ACTION NO.

C O N S E N T

Defendant, Teleprompter Corporation ("Teleprompter"), consents to the entry of the Final Judgment annexed hereto as follows:

1. Teleprompter admits the jurisdiction of this Court over it and over the subject matter of this action, and admits service of the Summons and Complaint upon it.

2. Teleprompter, without admitting or denying any of the allegations in the Complaint, except as to jurisdiction, hereby

Exhibit — Consent Judgment Annexed to Foregoing Complaint

consents to the entry of the annexed Final Judgment of Permanent Injunction.

3. Teleprompter consents to the annexed Final Judgment for the purpose of this action only and such consent is entered into without trial or argument of any issue of fact or law and does not constitute any evidence or admission or denial by Teleprompter or by its agents, servants, employees or any person in active concert or participation with them with respect to any such issue or of any wrongdoing or liability for any purpose.

4. Teleprompter consents to the entry of a Final Judgment in the form annexed hereto, enjoining Teleprompter its agents, servants and employees, successors and assigns and those persons in active concert or participation with it and each of them from violating Sections 10(b) and 13(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78j(b) and 78m(a)] and Rules 10b-5, 12b-20 and 13a-1 and Rule 3.06 of Regulation S-X [17 C.F.R. 240.10b-5, 12b-20 and 13a-1 and 17 C.F.R. 210.3-06] thereunder.

5. Teleprompter waives entry of findings of fact and conclusions of law provided by Rule 52 of the Federal Rules of Civil Procedure.

6. Teleprompter states that it enters into this consent voluntarily and that no promise or threat whatsoever has been made by plaintiff Securities and Exchange Commission or any member, officer, agent or representative thereof to induce it to enter into this consent.

Exhibit — Consent Judgment Annexed to Foregoing Complaint

7. Teleprompter agrees that the Final Judgment in the form annexed hereto, may be presented by plaintiff Securities and Exchange Commission to the Court for signature and entry without further notice.

8. Teleprompter agrees that this Court shall retain jurisdiction over it upon entry of the Final Judgment in the form annexed hereto, for the purpose of enforcing or modifying the terms and conditions contained in said Judgment.

9. This Consent shall be incorporated by reference in the Final Judgment of a Permanent Injunction, in the form annexed hereto, to be entered by the Court in this action.

Dated: _____

EXHIBIT — TELEPROMPTER NEWS RELEASE ANNEXED TO FOREGOING COMPLAINT

Teleprompter Corporation
50 West 44th Street
New York, New York 10036
Telephone, (212) 986-7500

For further information
please contact

Barry P. Simon

Teleprompter Corporation stated today that it consented to the issuance of an injunction in a case brought today by the Securities and Exchange Commission against the Company.

The Company consented to the injunction solely to avoid protracted litigation which would involve a drain on management's time and energies and involve substantial legal expenses. Teleprompter denies that it has engaged in any violation of law. It particularly denies, and objects to, any inference which could be drawn from allegations in the complaint to the effect that an injunction is necessary in order to cause Teleprompter to comply with the law.

Since September 1973 when Jack Kent Cooke became Chairman and Chief Executive Officer and continuing through to the recent appointment of Russell Karp as the Company's new president, Teleprompter's management has been completely overhauled and strengthened. Every effort has been made by

Exhibit — Teleprompter News Release Annexed to Foregoing Complaint

Teleprompter's new management to comply with both the letter and spirit of the Security Laws and it is confident that it has done so. Thus, Teleprompter recently took the unusual step of mailing to each of its stockholders its complete 10K Report for 1973 — so each of them could have access to the detailed information usually available only to professional investors. And in the 10K Report itself, Teleprompter took great pains to make the report as complete and as clear as possible.

As to the SEC complaint itself, much of it is based on the allegation that Teleprompter should have disclosed in previous financial statements and press releases the amount of construction related expenditures which it capitalized. Teleprompter emphasizes that

(a) The point raised by the SEC is entirely novel insofar as Teleprompter is aware. Teleprompter does not know of any other company which discloses the amount of construction related expenditures which it capitalizes; and

(b) Nevertheless, since last fall Teleprompter has, in fact, been disclosing the amount of construction related expenditures which it capitalized.

Teleprompter stated that the principal relief in the decree related to the maintenance or establishment by Teleprompter of internal procedures for the preparation of internal budget forecasts and

Exhibit — Teleprompter News Release Annexed to Foregoing Complaint

other data. Teleprompter can easily and gracefully accept the decree because these procedures have been done, are being done, and will be done.

Teleprompter is happy that the SEC investigation is now behind it.

* * *

NOTICE OF MOTION OF FIRST NATIONAL BANK OF BOSTON TO DISMISS

(Filed August 20, 1974)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HYMAN RADZANOWER,

Plaintiff,

-against

TOUCHE, ROSS & CO., et al.,

Defendants.

S I R S:

PLEASE TAKE NOTICE that, upon the annexed affidavit of Phillip A. Shaver, sworn to August 9, 1974, and the Exhibits thereto, and upon all of the papers heretofore filed, the undersigned will move before Hon. John M. Cannella, a Judge of this Court, at the United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 29th day of August, 1974, for an order, pursuant to Rules 12(b)(2) and (3) of the Federal Rules of Civil Procedure, dismissing the above-entitled action as against defendant the First National Bank of Boston on the ground that, pursuant to Section 94 of the National Bank Act (12 U.S.C. Sec. 94), venue of this action

Notice of Motion of First National Bank of Boston to Dismiss

as to the First National Bank of Boston is improper in the Southern District of New York.

Dated: New York, New York
August 19, 1974

Yours, etc.,

DEVEVOISE, PLIMPTON, LYONS & GATES

By (Sgd) Robert L. King
A Member of the Firm
Attorneys for Defendant The
First National Bank of Boston
299 Park Avenue
New York, New York 10017
(212) 752-6400

TO:

IRA JAY SANDS, ESQ.
Attorney for Plaintiff
701 Seventh Avenue
New York, New York 10036

SAMUEL GOTTLIEB, ESQ.
GAINSBURG, GOTTLIEB, LEVITAN & COLE
Co-Counsel for Plaintiff
122 East 42nd Street
New York, New York 10017

Notice of Motion of First National Bank of Boston to Dismiss

SHEA GOULD CLIMENKO & KRAMER
Attorneys for Defendant
Teleprompter Corporation
330 Madison Avenue
New York, New York 10017

ROSENMAN, COLIN, KAYE, PETSCHEK, FREUND & EMIL
Attorneys for Defendant Touche, Ross & Co.
575 Madison Avenue
New York, New York 10022

AFFIDAVIT OF PHILIP A. SHAVER IN SUPPORT OF MOTION TO DISMISS
(Filed August 20, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HYMAN RADZANOWER,

Plaintiff,

-against-

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W.J. BRESNAN, H.J. SCHLAFLY, LEONARD TOW, R.C. TODD, JR., B.P. SIMON, J.B. GREEN, L.H. READ, R.G. WILSON, H.E. FLAHERTY, B.D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R.F. LEWIS, P.L. LOWE, CHARLES LUCKMAN, M.B. MITCHELL, A.E. PUCKETT, J.H. RICHARDSON, M.E. LIVINGSTON, JACK WRATHER, FIRST NATIONAL BANK OF BOSTON,

Defendants.

74 Civ. 3025 (JMC)

STATE OF MASSACHUSETTS)
:
COUNTY OF SUFFOLK)

PHILIP A. SHAVER, being first duly sworn, deposes and says:

Affidavit of Philip A. Shaver in Support of Motion to Dismiss

1. I am Assistant Vice President, Associate Counsel and Secretary pro tempore of the Board of Directors of the First National Bank of Boston, ("Bank"), and I make this affidavit in support of the motion of the Bank pursuant to Title 12, U.S.C.A. 94, to dismiss the action as to the Bank for lack of proper venue.

2. The Bank is a national banking association incorporated under the banking laws of the United States (Title 12, U.S.C.A.), with its only place of business for conducting banking business located in the City of Boston, State of Massachusetts.

3. The Bank maintains no office, facility, or place of business of any kind in the Southern District of New York or in the State of New York, has no office or agent in either of them, except that solely in connection with its qualification pursuant to Section 131(3) of the Banking Law of New York to act in a fiduciary capacity in the surrogate's courts of the state and in other fiduciary capacities in the state, the Bank filed an instrument on January 15, 1971 appointing the Superintendent of Banks of the State of New York as its attorney upon whom all process could be served, in any action affecting or relating to an estate, trust or fund held or represented by it.

4. The Bank is a federally chartered National Banking Association, at the located specified in its charter, to wit, in the City of Boston, County of Suffolk, State of Massachusetts. True copies of the Articles of Incorporation and the Certificate of the Comptroller of the Currency are attached hereto as Exhibits A and B, respectively, and are made a part hereof.

Affidavit of Philip A. Shaver in Support of Motion to Dismiss

5. On the basis of the foregoing, I respectfully urge that the Motion of the Bank to dismiss the complaint as to it be granted.

6. The submission of this Affidavit shall not be construed as any waiver of the Bank's objection to its being sued in the United States District Court for the Southern District of New York on the grounds that under Section 12 of the National Bank Act venue in that District is improper.

(Sgd) Philip A. Shaver
Philip A. Shaver

Subscribed and sworn to this ninth
day of August, 1974.

(Sgd) Trudy Lee Wood
Notary Public in and for the County of Suffolk, State of Massachusetts

My commission Expires April 24, 1981

EXHIBIT — ARTICLES OF INCORPORATION ANNEXED TO FOREGOING AFFIDAVIT

The FIRST NATIONAL BANK of BOSTON

Boston, Massachusetts

Certified Copy

of the

Articles of Association

The FIRST NATIONAL BANK of BOSTON

Certified Copy

of the

Articles of Association

I, the undersigned, T. McLean Griffin, DO HEREBY CERTIFY that:

1. I am the Cashier and the Secretary of the Board of Directors of THE FIRST NATIONAL BANK OF BOSTON (hereinafter called the "*Bank*") and in that capacity have custody of its corporate records and have authority to certify to such records.

2. Set forth below is a complete and correct copy of the Articles of Association of the Bank as they are in effect on the date of this certificate:

Exhibit — Articles of Incorporation Annexed to Foregoing Affidavit

Charter No. 200

ARTICLES OF ASSOCIATION

FIRST. The title of this Association shall be "The First National Bank of Boston".

SECOND. The Head Office of this Association shall be in the City of Boston, in the County of Suffolk and Commonwealth of Massachusetts. The general business of this Association shall be conducted at its Head Office and at its legally established branches.

THIRD. The Board of Directors of this Association shall consist of such number of shareholders, not less than five nor more than twenty-five, as shall be determined from time to time by resolution of a majority of the votes to which all of the shareholders are at the time entitled to cast at any annual or special meeting of the shareholders. Unless otherwise provided by the laws of the United States, any vacancy in the Board of Directors for any reason, including an increase in the number thereof, may be filled by action of the Directors remaining.

FOURTH. The regular annual meeting of the shareholders of this Association for the election of directors and the transaction of whatever other business may be properly brought before said meeting shall be held at the Head Office, or such other convenient place as the Board of Directors may designate, on the day of each year specified therefor in the By-Laws of this

Exhibit — Articles of Incorporation Annexed to Foregoing Affidavit

Association, but if no election is held on that day it may be held on any subsequent day in accordance with the provisions of the laws of the United States. All elections shall be held in accordance with such lawful regulations as may be prescribed by the Board of Directors.

FIFTH: The authorized amount of Capital Stock of this Association shall be $90,000,000, divided into 7,200,000 shares of the par value of $12.50 each; but said Capital Stock may be increased or decreased from time to time in accordance with the provisions of the laws of the United States.

If the Capital Stock of this Association is increased by the sale of additional shares thereof for cash only, each shareholder shall be entitled to subscribe for such additional shares in proportion to the number of shares of the Capital Stock owned by him at the time the increase is authorized by the shareholders, unless another time subsequent to the date of the shareholders' meeting is specified in a resolution adopted by the shareholders at the time the increase is authorized. The Board of Directors shall have the power to prescribe a reasonable period of time within which the pre-emptive rights to subscribe to the new shares of Capital Stock must be exercised.

This Association, at any time and from time to time, may authorize and issue debt obligations, whether or not subordinated, and whether or not convertible into shares of the Capital Stock, without the approval of the shareholders. If debt obligations are issued by this Association which are convertible

into shares of the Capital Stock, no holder of Capital Stock shall have, as such, any pre-emptive or preferential rights to subscribe for, purchase or receive debt obligations or any shares of the Capital Stock which may be issued upon the conversion of any such debt obligations. The Board of Directors, in its discretion, may determine the terms and conditions of such obligations and the method and terms of issue and sale thereof.

SIXTH. The Board of Directors (a majority of which shall be a quorum to transact business) shall appoint one of its members to be President of this Association who shall hold office (unless he shall become disqualified or be sooner removed by a two-thirds vote of the members of the Board) for the term for which he was elected a director. The Board of Directors may appoint one of its members to be Chairman of the Board, who shall perform such duties as may be designated by it. The Board of Directors shall have power to appoint one or more Vice Presidents, and to appoint a Cashier and such other officers and employees as may be required to transact the business of this Association.

The Board of Directors shall have the power to define the duties of the officers and employees of this Association; to fix the salaries to be paid to them; to dismiss them; to require bonds from them and to fix the penalty thereof; to regulate the manner in which any increase of the capital of this Association shall be made to manage and administer the business affairs of this Association; to make all By-Laws that it may be lawful for them

to make; and generally to do and perform all acts that it may be legal for a board of directors to do and perform.

SEVENTH. The Board of Directors shall have the power to change the location of the Head Office of this Association to any other place within the limits of the City of Boston, Massachusetts, without the approval of the shareholders but subject to the approval of the Comptroller of the Currency, and shall have the power to establish or change the location of any branch or branches of this Association without the approval of the shareholders but subject to such limitations as from time to time may be provided by law.

EIGHTH. The corporate existence of this Association shall continue until terminated in accordance with the laws of the United States.

NINTH. The Board of Directors, or the holders of not less than one-tenth of the outstanding Capital Stock of this Association, may call a special meeting of shareholders at any time; *provided, however,* that unless otherwise provided by law, not less than ten days prior to the date fixed for any such meeting, a notice of the time, place and purpose of the meeting shall be given by first-class mail, postage prepaid, to each shareholder of record at his address as shown upon the books of this Association.

TENTH. Any person, his heirs, executors or administrators, may be indemnified or reimbursed by this

Exhibit — Articles of Incorporation Annexed to Foregoing Affidavit

Association for reasonable expenses actually incurred in connection with any action, suit or proceeding, civil or criminal, to which he or they shall be made a party by reason of his being or having been a director, officer or employee of this Association or of any firm, corporation or organization which he served in any such capacity at the request of this Association; *provided, however,* that no person shall be so indemnified or reimbursed in relation to any matter in such action, suit or proceeding as to which he shall finally be adjudged to have been guilty of or liable for gross negligence, willful misconduct or criminal acts in the performance of his duties to this Association; and *provided, further,* that no person shall be so indemnified or reimbursed in relation to any matter in such action, suit or proceeding which has been made the subject of a compromise settlement except with the approval of a court of competent jurisdiction, or the holders of record of a majority of the outstanding shares of this Association, or the Board of Directors, acting by vote of directors not parties to the same or substantially the same action, suit or proceeding, constituting a majority of the whole number of the directors. The foregoing right of indemnification or reimbursement shall not be exclusive of other rights to which such person, his heirs, executors or administrators may be entitled as a matter of law.

This Association may, upon the affirmative vote of a majority of its Board of Directors, purchase insurance for the purpose of indemnifying its directors, officers and other employees to the extent that such indemnification is allowed in the preceding paragraph. Such insurance may, but need not, be for the benefit of all directors, officers or employees.

Exhibit — Articles of Incorporation Annexed to Foregoing Affidavit

ELEVENTH. These Articles of Association may be amended at any regular or special meeting of the shareholders by the affirmative vote of the holders of a majority of the outstanding shares of Capital Stock of this Association, unless the vote of the holders of a greater amount of such Captial Stock is required by law, and in that case, by the vote of the holders of such greater amount thereof.

IN WITNESS WHEREOF, we have hereunto set out hands this 10th day of September, 1970.

ROGER C. DAMON
Roger C. Damon

RICHARD D. HILL
Richard D. Hill

WILLIAM L. BROWN
William L. Brown

J. WARREN OLMSTED
J. Warren Olmsted

GEORGE E. PHALEN
George E. Phalen

IN WITNESS WHEREOF, I have hereunto set my hand and affixed hereto the seal of THE FIRST NATIONAL BANK OF BOSTON this 13th day of August, 1974.

s/ T. McLean Griffin
Cashier and Secretary of the
Board of Directors

Exhibit — Articles of Incorporation Annexed to Foregoing Affidavit

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY

On the 13th day of August, 1974, before me, the undersigned Notary Public in and for said Commonwealth duly commissioned and sworn, personally came T. McLEAN GRIFFIN, to me known, who, being by me duly sworn, did depose and say that he resides at No. 14 Beckford Street, Salem, Massachusetts; that he is the Cashier and Secretary of the Board of Directors of THE FIRST NATIONAL BANK OF BOSTON, a national banking association organized and existing under the laws of the United States of America; that he executed the foregoing certificate in his capacity aforesaid as his free act and deed and that the seal affixed thereto is the seal of said Bank, and that he was duly authorized by the Board of Directors of said Bank to execute said certificate and to affix the seal of said Bank thereto.

s/ Trudy Lee Wood
Notary Public

TRUDY LEE WOOD
NOTARY PUBLIC
My Commission expires April 24, 1981

EXHIBIT — CERTIFICATE OF THE COMPTROLLER OF THE CURRENCY ANNEXED TO FOREGOING AFFIDAVIT

CERTIFICATE

TREASURY DEPARTMENT)
Office of) ss:
Comptroller of the Currency)

J.T. Watson, Deputy Comptroller of the Currency, do hereby certify

1. Pursuant to Revised Statutues 324, et seq., as amended, 12 U.S.C. 1, et seq., the Comptroller of the Currency charters and exercises regulatory and supervisory authority over all national banking associations;

2. On January 16, 1864, Safety Fund Bank of Boston, Boston, Massachusetts, was chartered as a National Banking Association under the laws of the United States and under the title of "The First National Bank of Boston";

3. The document hereto attached is a true and complete copy of the Charter Certificate issued to The First National Bank of Boston, Boston, Massachusetts, the original of which certificate was issued by the office on January 16, 1864;

4. Effective as of the opening of business January 4, 1971, this bank merged into The Massachusetts Bank, National Association, Boston Massachusetts, under the title of "The First National Bank of Boston"; and

Exhibit — Certificate of the Comptroller of the Currency Annexed to Foregoing Affidavit

5. The First National Bank of Boston, Boston, Massachusetts, continues to hold a valid certificate to do business as a National Banking Association.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the seal of Office of the Comptroller of the Currency to be affixed to these presents at the Treasury Department, in the City of Washington and District of Columbia, this 17th day of February, A.D. 1972.

s/ J. T. Watson
Deputy Comptroller of the Currency

TREASURY DEPARTMENT
Office of Comptroller of the Currency,

Washington, January 16, 1864.

WHEREAS, by satisfactory evidence presented to the undersigned, it has been made to appear that the First National Bank of Boston in the County of Suffolk and State of Massachusetts has been duly organized under, and according to the requirements of the act of Congress entitled "An act to provide a national currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof; approved February 25, 1863, and has complied with all the provisions of said act required to be complied with before commencing the business of Banking:

Exhibit — Certificate of the Comptroller of the Currency Annexed to Foregoing Affidavit

NOW, THEREFORE, I. Hugh Mc Gillock Comptroller of the Currency, do hereby certify that the said First National Bank of Boston, County of Suffolk and State of Massachusetts is authorized to commence the business of Banking under the act aforesaid.

IN TESTIMONY WHEREOF, witness my hand and seal of office, this sixteenth day of January, 1864.

s/ Hugh McGillock
Comptroller of the Currency.

AFFIDAVIT OF IRA JAY SANDS IN OPPOSITION BY PLAINTIFF TO MOTION OF DEFENDANT FIRST NATIONAL BANK OF BOSTON TO DISMISS
(Filed September 23, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HYMAN RADZANOWER,

Plaintiff,

-against-

TOUCHE, ROSS & CO., et al.,

Defendants.

74 Civ. 3025 (JMC)

STATE OF NEW YORK: SS.:

COUNTY OF NEW YORK

IRA JAY SANDS, being duly sworn, deposes and says:

I am the attorney for plaintiff. I submit this affidavit and the accompanying Memorandum of Law in Opposition to the Motion of First National Bank of Boston to Dismiss the Complaint as to Them.

Affidavit of Ira Jay Sands in Opposition by Plaintiff to Motion of Defendant First National Bank of Boston to Dismiss

Their motion is based upon the illusion that despite their affirmative designation of the Superintendent of Banks of New York as an agent for service of process upon them, they can escape being sued in this state because of their reliance upon Section 94 of the National Bank Act. However, they are inaccurate as it affects the First National Bank of Boston.

Under normal circumstances, of course, Section 94 of the National Bank Act would prevent a bank foreign to this judicial district from being sued in this judicial district. However, plaintiff has obtained a copy of a letter dated January 15, 1971 to "Legal Division, State of New York Banking Department" from First National Bank of Boston over the signature of its Vice President (with copy to the Superintendent of Banks of the State of New York) enclosing for filing various instruments "designating the Superintendant of Banks of the State of New York or his successor, as agent for service of process".

The designation form itself states:

> "This Bank desires to transact business in the State of New York. . . . The First National Bank of Boston hereby constitutes and appoints the Superintendent of Banks, State of New York, and his successors in such office, to be the true and lawful attorney of this Bank, in and for the State of New York, upon whom all lawful process in any action or proceeding against this Bank in New York may be served in like manner and with the same effect as if this Bank existed therein."

Affidavit of Ira Jay Sands in Opposition by Plaintiff to Motion of Defendant First National Bank of Boston to Dismiss

Attached hereto as Exhibit "A" is a copy of the letter of January 15, 1971 from the Bank to the Legal Division, New York Banking Department. Attached hereto as Exhibit "B" is a copy of a designation of the Bank which was acknowledged by the Official Cashier of the Bank on January 15, 1971.

It is respectfully urged that since this particular Bank has sought the privilege under the laws of the State of New York to conduct business within the State of New York and has voluntarily filed certificates designating an officer of the State of New York as agent for the service of process in the State of New York, this Bank cannot now be heard to say that such official act of consent was really meaningless and of no force or effect, but rather an empty gesture in 1971.

The attached Memorandum of Law submitted by plaintiff sets forth statutory support for the position taken by plaintiff. Therefore, the motion by the Defendant Bank should be denied.

(Sgd) Ira Sands
IRA JAY SANDS

Sworn to before me

this 18th day of September, 1974.

(Sgd) Raymond Burrasca
Notary Public, State of New York

My commission expires March 30, 1976

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT OF IRA JAY SANDS

January 15, 1971

Legal Division
State of New York
Banking Department
100 Church Street
New York, New York

Gentlemen:

Pursuant to the enclosed copies of a letter dated December 9, 1970 which we received from Peter J. Sparano, Administrative Officer we are enclosing herewith for filing, as required by Section 131(3) of the New York Banking Law, the following instruments on behalf of The First National Bank of Boston:

1. A Power of Attorney executed by The First National Bank of Boston under date of January 15, 1971, designating the Superintendent of Banks of the State of New York or his successor, as agent for service of process, and further designating T. McLean Griffin, Cashier, and his successors in office, as being the appropriate officer to whom process shall be forwarded.

2. A certified copy of the Articles of Association of The First National Bank of Boston.

3. An affidavit signed by the Bank's counsel, Edward M. Coudit, Jr., Esquire, certifying that

reciprocity exists between Massachusetts and New York.

4. Certificates of the Comptroller of the Currency with respect to the merger of the Bank and Old Colony Trust Company and with respect to the interim conversion of Old Colony Trust Company into a national bank.

We note that as the result of a merger on January 4, 1971, The First National Bank of Boston continues the heretofore existing fiduciary appointments of Old Colony Trust Company, a Massachusetts corporation, and is entitled to further appointments under instruments in which Old Colony Trust Company is named, as well as appointments in the name of The First National Bank of Boston.

We also note that favorable reciprocity for foreign banks acting as fiduciaries in Massachusetts continues in effect under Massachusetts General Laws, Chapter 167, Section 45A, a copy of which is enclosed.

Please advise us if you require anything further in connection with our continued qualification under Section 131.

Very truly yours,

THE FIRST NATIONAL BANK OF BOSTON

By _____
Vice President, Old
Colony Trust Division

Enclosures

Copies to:
Mr. William T. Pantzer, Jr.
Superintendent of Banks
State of New York State House
Albany, New York

Mr. T. McLean Griffin, Cashier
The First National Bank of Boston

KNOW ALL MEN BY THESE PRESENTS that I.T. McLEAN GRIFFIN am Cashier of The First National Bank of Boston, a national banking association located in the City of Boston, County of Suffolk, Commonwealth of Massachusetts, and organized under the laws of the United States of America. This Bank desires to transact business in the State of New York in conformity with Section 131(3) of the New York State Banking Law The First National Bank of Boston hereby constitutes and appoints the Superintendant of Banks, State of New York, and his successors in such office, to be the true and lawful attorney of this Bank in and for the State of New York, upon whom all lawful processes in any action or proceeding against this Bank in New York may be served in like manner and with the same effect as if this Bank existed therein.

THE FIRST NATIONAL BANK OF BOSTON hereby designates the undersigned, T. McLEAN GRIFFIN, Cashier, and his successors in office, to be the appropriate officer of the

Exhibits Annexed to Foregoing Affidavit of Ira Jay Sands

Bank to whom proceeds shall be forwarded by the Superintendant of Banks.

s/ T. McLean Griffin
T. McLEAN GRIFFIN,
Cashier

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF SUFFOLK

The above T. McLEAN GRIFFIN personally appeared before me and acknowledged this statement to be his free act and deed, before me, this 15 day of January, 1971.

s/ (illegible)
Notary Public

ADDITIONAL AFFIDAVIT IN OPPOSITION BY PLAINTIFF TO MOTION OF DEFENDANT THE FIRST NATIONAL BANK OF BOSTON TO DISMISS THE COMPLAINT AS TO IT
(Filed September 24, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HYMAN RADZANOWER,

Plaintiff,

-against-

TOUCHE, ROSS & CO., et al.,

Defendants.

74 Civ. 3025 (JMC)

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

IRA JAY SANDS, being duly sworn, deposes and says:

The Reply Memorandum of this Defendant wrongly claims that its qualification to do Banking business in New York, designated the Superintendent of Banks of the State of New York, in a "limited capacity only."

Additional Affidavit in Opposition by Plaintiff to Motion of Defendant the First National Bank of Boston to Dismiss the Complaint as to It

Plaintiff respectfully submits that the defendant is inaccurate on the state of the law, is inaccurate in its citations, and is inaccurate on the facts of its own designation of the Superintendent of Banks.

First, the written designation by this defendant of the Superintendent of Banks as its agent for service of process, was not limited in any manner. On the contrary, it is widespread and unlimited with respect to matters which occur within the State of New York.

This defendant Bank failed to do what the Chase National Bank did in *Buffum v. Chase National Bank,* 192 F.2d 58, 61 (2nd Cir. 1951), where the Chase Bank first had originally designated in Illinois, that its agent would accept service "in all suits in Illinois", but later, replaced that designation with another resolution limiting the service to specific matters.

Our defendant Bank has designated its New York agent broadside, without limitation, as Chase originally had done in Illinois before it corrected itself.

In fact, the *Buffum* case, cited so strongly by our defendant in its support, is directly against our defendant. In *Buffum,* the Court emphasized that the consent to be sued which had been executed by Chase National Bank was "limited" in its language, for it said (p. 59):

Additional Affidavit in Opposition by Plaintiff to Motion of Defendant the First National Bank of Boston to Dismiss the Complaint as to It

> "In connection with the acceptance and execution of trusts and receipts of deposits and trust funds in Illinois."

Our defendant cannot show any language in its designation which limits the scope, as *Buffum* did in writing.

On page 60, the decision again referred to the fact that the Chase Bank had not consented to be sued in Illinois except "in connection with the acceptance and execution of trusts and receipts of deposits of trust funds in Illinois." The Court further stated that these matters were not invovled in the action.

The logic is that the Court would have not gone so far out of its way so many times to explain that the subject of the action was not within the precise limiting language of the Chase Bank's written designation.

The *Buffum* Court emphasized that the shield of Section 94 can be waived by a Bank, by deed or by word.

On page 61, the *Buffum* Court discussed in detail the type of action involved, and concluded that the specific limitation by the Chase Bank of its waiver did not include the contract business which was the subject of the litigation.

From the specific logic of the *Buffum* case, it is clear that this Court can precisely hold that since the First National Bank

of Boston designated the Superintendent of Banks without limitation, to accept service in actions resulting from New York transactions, the bank intentionally waived and did not preserve to itself protection against any specific type of litigation.

The defendant also cites *Tuthill v. George May International,* 55 Misc.2d 542, 285 N.Y.S. 2d 317 (Sup. Ct. Suffolk 1967); but Tuthill is not in point. There, the plaintiff was suing his employer in connection with the employer's profit-sharing trust which had funds deposited in the Continental Illinois Bank in Chicago. It was admitted that the trust was established and administered in Chicago, and all funds for the trust were there deposited with no funds deposited in New York. The transaction therefore did not take place in New York. Whether or not Continental Illinois had designated the Superintendent of Banks to accept process with respect to *transactions that took place in New York,* did not apply to that situation.

With respect to the letter from our defendant First National Bank of Boston, to the New York State Superintendent of Banks, this was *not* supplied to the Court by the defendants, and was only furnished to plaintiff's counsel after we had ascertained the probable existence of such a designation by the defendant, and only *after* our request that such designation be produced.

Of course we are not suggesting that the defendants were withholding evidence or misleading the Court and the language

was certainly not chosen with any intent other than to present for the Court's examination the designation of the Superintendent of Banks, which had been voluntarily filed by this defendant for its own benefit.

The fact that the Bank may maintain no active facility or place of business in New York does not water down its clear unqualified designation of the Superintendent of Banks as agent for process. Despite its claim on page 4 of its memorandum that the designation of the Superintendent of Banks was for the purpose of service "in any action affecting or relating to an estate, trust or fund, held or represented by it" no such language or similar language appears in the broad scale designation.

Neither does Section 131 (3) of the New York State Banking Law limit the broadscale designation which this Bank filed.

Furthermore, defendant Bank is inaccurate on page 4 of its memorandum in stating that we suggest that service would be proper for any matter "arising out of its general banking business conducted in Boston."

We did *not* so state! Plaintiff's position is that the designation by this defendant Bank, covers suits arising out of its business *conducted in New York*.

Additional Affidavit in Opposition by Plaintiff to Motion of Defendant the First National Bank of Boston to Dismiss the Complaint as to It

WHEREFORE, it is respectfully urged that the broadscale waiver by the Bank, and written designation of the Superintendent of Banks, voluntarily filed by the First National Bank of Boston, mandates that its motion be denied.

(Sgd) Ira Jay Sands
IRA JAY SANDS

Sworn to before me this

day of September, 1974

EXHIBIT ANNEXED TO FOREGOING ADDITIONAL AFFIDAVIT

SEE IDENTICAL EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS DATED SEPT. 18, 1974, pp. 79a-81a OF THIS APPENDIX.

EXHIBIT ANNEXED TO FOREGOING ADDITIONAL AFFIDAVIT

SEE IDENTICAL EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS DATED SEPT. 18, 1974, pp. 81a-82a OF THIS APPENDIX.

ENDORSEMENT AND ORDER OF HON. LLOYD F. MacMAHON DISMISSING ACTION AS TO DEFENDANT FIRST NATIONAL BANK OF BOSTON ON GROUND OF IMPROPER VENUE DATED OCTOBER 21, 1974
(Filed October 22, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HYMAN RADZANOWER,

Plaintiff,

-against-

TOUCHE, ROSS & CO., et al.,

Defendants.

74 Civ. 3025 (LFM)

MacMahon, D.J.:

The within motion, pursuant to Rules 12(b) (2) and (3), Fed. R. Civ. P., for an order dismissing this action as to defendant First National Bank of Boston on the ground of improper venue, is granted.

Absent waiver or consent, a national bank may be sued only in the district in which it is established. 12 U.S.C. Section 94; *Cope v. Anderson,* 331 U.S. 461, 467 (1947); *Klein v. Bower,*

421 F.2d 338, 342 (2d Cir. 1970); ***Bruns, Nordeman & Co. v. American Nat'l Bank & Trust Co.***, 394 F.2d 300 (2d cir.), *cert. denied*, 393 U.S. 855 (1968); ***Buffum v. Chase Nat. Bank of City of N.Y.***, 192 F.2d 58 (7th Cir. 1951), *cert. denied*, 342 U.S. 944 (1952). Movant is established in Boston, Massachusetts, within the meaning of 12 U.S.C. Section 94, because its charter specifies Boston as its principal place of business. ***Buffum v. Chase Nat. Bank of City of N.Y., supra***, 192 F.2d at 60; *Leonardi v. Chase Nat. Bank of City of N.Y.*, 81 F.2d 19, 22 (2d cir.), *cert. denied*, 298 U.S. 677 (1936); *Southeast Guaranty Trust Co. v. Rodman & Renshaw, Inc.*, 358 F. Supp. 1001, 1004 (N.D. Ill. 1973); *General Electric Credit Corp. v. James Talcott, Inc.*, 271 F. Supp. 699 (S.D.N.Y. 1966).

Movant's designation of the New York Superintendent of Banks to receive process on its behalf is not a waiver of this venue provision. Although the language of the designation is broad, it specifically evidences an intent to comply with Section 131(c) of the New York Banking Law, which requires such a designation before a foreign bank can operate in a fiduciary capacity in New York. This designation operates as a waiver of the venue provision only in actions involving movant's fiduciary acts in New York, and no such acts are alleged or involved here.

Accordingly, First National Bank of Boston's motion to dismiss this action on the ground of improper venue is granted in all respects.

So ordered.

Dated: New York, N.Y.
October 21, 1974

(sgd) Lloyd F. MacMahon
LLOYD F. MACMAHON
United States District Judge

NOTICE OF APPEAL
(Filed November 15, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HYMAN RADZANOWER,

Plaintiff,

-against-

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W.J. BRESNAN, H.J. SCHLAFLY, LEONARD TOW, R.C. TODD, JR., B.P. SIMON, J.B. GREEN, L.H. READ, R.G. WILSON, H.E. FLAHERTY, B.D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R.F. LEWIS, P.L. LOWE, CHARLES LUCKMAN, M.B. MITCHELL, A.E. PLUCKETT, J.H. RICHARDSON, M.E. LIVINGSTON, JACK WRATHER, FIRST NATIONAL BANK OF BOSTON,

Defendants.

S I R S:

PLEASE TAKE NOTICE that plaintiff herein appeals to the United States Court of Appeals for the Second Circuit, located at the United States Courthouse, Foley Square, New York, New York, from each and every part of an Order of the Honorable Lloyd F. MacMahon, United States District Judge,

Notice of Appeal

dated October 21, 1974, granting a motion by defendant First National Bank of Boston for an order dismissing this action as to it on the ground of improper venue.

IRA JAY SANDS

By (Sgd) Ira Sands
Attorney for Plaintiff
Office and Post Office Address
701 Seventh Avenue
New York, New York 10036
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AND

SAMUEL GOTTLIEB
GAINSBURG, GOTTLIEB,
LEVITAN & COLE
Co-Counsel for Plaintiff
122 East 42nd Street
New York, New York 10017
(212) 697-3440

Dated: New York, New York
November 15, 1974

JUDGMENT OF THE UNITED STATES COURT OF APPEALS
(Filed May 23, 1975)

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

- - - o - - -

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of May, one thousand nine hundred and seventy-five.

PRESENT:

HON. WILLIAM H. MULLIGAN

HON. MURRAY I. GURFEIN
Circuit Judges

HON. MILTON POLLACK
District Judge

74-2538

Hyman Radzanower,

Plaintiff-Appellant

v.

Judgment of the United States Court of Appeals

Touche Ross & Co., Teleprompter Corporation, Jack K. Cooke, Raymond P. Shafer, W.J. Bresnan, B.P. Simon, J.B. Green, L.H. Read, R.G. Wilson, H.E. Flaherty, B.D. Fischman, Berle Adams, Marvin Caron, R.F. Lewis, P.L. Lowe, Charles Luckman, M.B. Mitchell, A.E. Puckett, J.H. Richardson, M.E. Livingston, Jack Wrather, and First National Bank of Boston,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk

75-268

Supreme Court, U. S.
FILED
SEP 19 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 268

HYMAN RADZANOWER,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF BOSTON,

Respondent,

and

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W. J. BRESNAN, H. J. SCHAFLY, LEONARD TOW, R. C. TODD, JR., B. P. SIMON, J. B. GREEN, L. H. READ, R. G. WILSON, H. E. FLAHERTY, B. D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R. F. LEWIS, P. L. LOWE, CHARLES LUCKMAN, M. B. MITCHELL, A. E. PUCKETT, J. H. RICHARDSON, M. E. LIVINGSTON, and JACK WRATHER,

Defendants.

BRIEF IN OPPOSITION TO CERTIORARI

SAMUEL E. GATES
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299 Park Avenue
New York, New York 10017
Attorneys for Respondent

Of Counsel:

DEBEVOISE, PLIMPTON, LYONS
& GATES

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IN THE

Supreme Court of the United States

October Term, 1975

No. 268

HYMAN RADZANOWER,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF BOSTON,

Respondent,

and

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W. J. BRESNAN, H. J. SCHAFLY, LEONARD TOW, R. C. TODD, JR., B. P. SIMON, J. B. GREEN, L. H. READ, R. G. WILSON, H. E. FLAHERTY, B. D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R. F. LEWIS, P. L. LOWE, CHARLES LUCKMAN, M. B. MITCHELL, A. E. PUCKETT, J. H. RICHARDSON, M. E. LIVINGSTON, and JACK WRATHER,

Defendants.

BRIEF IN OPPOSITION TO CERTIORARI

Question Presented

The only question that can properly be presented by the petition for certiorari in this case is whether The First National Bank of Boston (the "Bank"), which is established in Boston, Massachusetts, waived the mandatory venue provisions of section 94 of the National Bank Act (12 U.S.C. §94) by qualifying to engage in limited fiduciary activities in New York State.

Proceedings Below

The Bank moved, pursuant to Rule 12(2) and (3), Fed. R. Civ. P., in the United States District Court for the Southern District of New York (the "District Court") for an order dismissing this action as to it on the ground of improper venue. On October 21, 1974, Judge Lloyd F. MacMahon of that court filed an unreported Endorsement granting the Bank's motion, and judgment was entered thereon. An appeal from that judgment was taken to the United States Court of Appeals for the Second Circuit (the "Court of Appeals"), and at the conclusion of oral argument a panel of that court (Circuit Judges William H. Mulligan and Murray I. Gurfein and District Judge Milton Pollack, sitting by designation) affirmed in open court the District Court's judgment. No petition for rehearing, pursuant to Rule 40, Fed. R. App. P., was sought.

The Petition Should Be Denied

The decision below is clearly correct and in accord with the decisions of all other Circuit Courts of Appeal which have construed the question of waiver of the provisions of section 94 of the National Bank Act.

The petition seeks to raise for the first time the issue of whether the venue provisions of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §78aa (1970), should prevail over the special venue provisions of the National Bank Act, 12 U.S.C. §94 (1970). This issue was never presented for review to the District Court or to

the Court of Appeals. Accordingly, the record in this case does not present an opportunity to review such conflict as may exist in decisions between the Second and Ninth Circuits and the Third Circuit with respect to the prevalence of the special venue provisions of the National Bank Act.

Statement of the Case

The Bank is a national banking association organized and existing under the laws of the United States. *See* 12 U.S.C. §§12-78 (1970). Section 94 of the National Bank Act requires that an action against the Bank be brought in the District of the United States in which the Bank is established. Petitioner in his complaint asserted a claim for relief purportedly arising under the Exchange Act, which contains liberal venue provisions, 15 U.S.C. §78aa (1970). Petitioner did not dispute either in the District Court or in the Court of Appeals that venue in this action with respect to the Bank is determined by section 94 of the National Bank Act.

The Bank is established in the City of Boston, Commonwealth of Massachusetts. On January 15, 1971 the Bank, as a foreign bank, qualified pursuant to section 131(3) of the New York Banking Law to perform certain limited fiduciary activities in New York State with respect to the administration of trusts and estates. As required by section 131(3), the Bank filed with the Superintendent of Banks for the State of New York a Power of Attorney which designated the Superintendent of Banks as the Bank's agent in New York upon whom process could be served in any action affecting or relating to an estate, trust

or fund held by the Bank or represented by it. It is expressly provided by section 131(3) that this designation permitted the Bank to engage only in certain limited and specified fiduciary activities.

I.

The only issue presented by petitioner in the District Court or in the Court of Appeals was whether the Bank waived the venue provisions of section 94 of the National Bank Act.

Both in the District Court and in the Court of Appeals, petitioner's sole and extremely formalistic claim was that the Bank expressly waived its right to be sued only in the District of Massachusetts because the Power of Attorney filed by the Bank did not duplicate precisely the language contained in section 131(3) of the New York Banking Law. The Court of Appeals affirmed the District Court's determination that the Bank did not voluntarily and knowingly relinquish its right to be sued only in the District of Massachusetts except as to those activities which are within the scope of section 131(3). No other issue was ever raised in or decided by the District Court or the Court of Appeals.

Now, for the first time, petitioner seeks to smuggle an additional issue into the case and attempts to raise the question of whether the mandatory venue requirement of section 94 of the National Bank Act has been superseded by the venue provisions of the Exchange Act. Petitioner raises this new question by asking this Court to resolve a conflict in decisions between the Second and Ninth Circuits

and the Third Circuit, with respect to the prevalence of the venue provisions of the National Bank Act over those of the Exchange Act.

Because this Court has construed the venue provision of the National Bank Act as mandatory, *Michigan Nat'l Bank* v. *Robertson*, 372 U.S. 591 (1963); *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 562 (1963), the United States Court of Appeals for the Second Circuit has squarely held that the venue provisions of the National Bank Act prevail over the venue provisions of the Exchange Act. *Klein* v. *Bower*, 421 F.2d 338, 342 (2d Cir. 1970); *Bruns, Nordeman & Co.* v. *American Nat'l Bank & Trust Co.*, 394 F.2d 300 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968).

The view taken by the Second Circuit has also been adopted by the Ninth Circuit. *United States National Bank* v. *Hill*, 434 F.2d 1019 (9th Cir. 1970). See also *The First National Bank of Boston* v. *United States District Court*, 468 F.2d 180 (9th Cir. 1972). (Leonard P. Moore, J., discussing Second Circuit cases).

In *Ronson Corporation* v. *Liquifin Aktiengesellschaft*, 483 F.2d 852 (3d Cir. 1973), the Court of Appeals for the Third Circuit reached the conclusion that the venue provisions of the Exchange Act prevail over the special venue requirement of the National Bank Act. However, that court recognized that its decision was contrary to the overwhelming weight of appellate authority.

At no time did petitioner raise or ask the Court of Appeals or the District Court to consider the issue with

respect to which the Second and Ninth Circuits and the Third Circuit have reached conflicting decisions—namely, whether the venue provisions of section 94 of the National Bank Act are superseded by those of the Exchange Act. The Court of Appeals' decision as to which review is now sought did not involve that issue and is not in conflict with any decision of another Court of Appeals on the same matter of federal law. Neither in his briefs filed in the District Court in opposition to the Bank's motion to dismiss (a copy of which is set forth in the Appendix hereto, 1a-7a) nor in his brief in the Court of Appeals (a copy of which also is set forth in the Appendix hereto, 8a-20a) did petitioner ever discuss this issue.

In fact, petitioner never cited the *Ronson* case in any of his briefs in the District Court or the Court of Appeals. The only time petitioner ever referred to the *Ronson* case, decided on August 15, 1973, was on May 23, 1975 at oral argument before the Court of Appeals. After petitioner's counsel called the court's attention to the *Ronson* case, Judge Mulligan specifically asked whether in light of *Ronson* petitioner was asking the Court of Appeals to reconsider and overrule its decision in the *Bruns, Nordeman* case, *supra*. Petitioner's counsel stated expressly that he was declining so to do. Rather, he indicated that he was referring to *Ronson* only in support of the proposition that the venue provisions of the National Bank Act should be narrowly interpreted and that the Court should find, as a factual matter, that the Bank had waived the venue provisions of section 94.*

* The argument before the Court of Appeals was tape-recorded. However, copies of transcripts of arguments before the Court of Appeals for the Second Circuit are not available to the parties.

Having failed to raise the issue of the prevalence of the venue provisions of the National Bank Act in the District Court or the Court of Appeals, petitioner cannot now seek review of such issue. *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330 (1967); *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16 (1958); *Husty* v. *United States*, 382 U.S. 694, 701-702 (1931). As stated in *Duignan* v. *United States*, 274 U.S. 195, 200 (1927), "This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed [citations omitted]". Clearly, this is not an exceptional case.

II.

The conflict in decisions between the Second and Ninth Circuits and the Third Circuit with respect to the venue provisions of the National Bank Act does not warrant review by this Court at this time.

Even if petitioner had raised below the issue of whether the venue provisions of the Exchange Act prevail over those of section 94 of the National Bank Act and the Second Circuit had adhered to its earlier decisions, review should still be denied. The *Bruns, Nordeman* case and other Second and Ninth Circuit cases were correctly decided, and it is submitted that the decision and reasoning of the *Ronson* case are patently erroneous.

The *Bruns, Nordeman* case properly recognized that section 94 of the National Bank Act is mandatory in application and requires that all transitory actions be brought

in the district in which a national bank is established or located. *Mercantile Nat'l Bank* v. *Langdeau, supra; Michigan Nat'l Bank* v. *Robertson, supra.* This Court has held on numerous occasions that in the absence of express legislative intent to the contrary, statutes dealing with a narrow and specific problem will be held to prevail over more general provisions of another statute. *E.g. Kepner* v. *United States,* 195 U.S. 100, 125 (1904); *Rodgers* v. *United States,* 185 U.S. 83, 87-88 (1902). This Court has specifically held that where particular venue provisions have been enacted by Congress, the broader language of a general venue statute does not supersede the specific legislation even though it may be literally applicable. *Stonite Products Co.* v. *Melvin Lloyd Co.,* 315 U.S. 561 (1942); *Fourco Glass Co.* v. *Transmirra Products Corp.,* 353 U.S. 222 (1957).

Moreover, because no decision dealing with the issue of the prevalence of the National Bank Act's venue provisions was made by the Court of Appeals in the instant case, this Court does not have the benefit here of a record containing any opinion of the Second Circuit's reexamining and reconsidering its earlier decisions or the decision in *Ronson.* The conflict is not clearly manifested and the extent to which the Circuits are in conflict cannot be properly defined from this record.

Conclusion

The petition should be denied.

Respectfully submitted,

SAMUEL E. GATES
RICHARD I. JANVEY
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New York, New York 10017
Attorneys for Respondent

Of Counsel:

DEBEVOISE, PLIMPTON, LYONS
& GATES

APPENDIX

United States District Court
Southern District of New York

74 Civ. 3025 (JMC)

HYMAN RADZANOWER,

Plaintiff,

against

TOUCHE, ROSS & Co., *et al.*,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION BY DEFENDANT FIRST NATIONAL BANK OF BOSTON TO DISMISS THE COMPLAINT AS TO IT

IRA JAY SANDS
701 Seventh Avenue
New York, New York 10036

Of Counsel:

IRA JAY SANDS
SAMUEL GOTTLIEB
STANLEY YAKER

United States District Court

Southern District of New York

---

74 Civ. 3025 (JMC)

HYMAN RADZANOWER,

Plaintiff,

against

TOUCHE, ROSS & Co., *et al.*,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION BY DEFENDANT FIRST NATIONAL BANK OF BOSTON TO DISMISS THE COMPLAINT AS TO IT

Facts

Plaintiff has included the First National Bank of Boston as a party defendant upon the ground that the Bank conducted business in the State of New York in its involvement with defendant Teleprompter Corporation, and other defendants, and that the Bank aided and abetted the other defendants in the violations of the Securities Acts alleged, including a violation of the common law of the State of New York and the Act of the State of New York, commonly known as the "Martin Act" which controls securities dealings within the State of New York.

The Bank moves for dismissal as to it, claiming that the National Bank Act, §94, requires a plaintiff to only sue the Bank in the District of Massachusetts where the Bank was founded.

On the other hand, plaintiff has located and introduces as an exhibit to plaintiff's affidavit in opposition herein, a letter dated January 15, 1971 to the Legal Division of the State of New York Banking Department, with a copy to the New York State Superintendent of Banks, enclosing various instruments in connection with the designation of the Superintendent of Banks of the State of New York as agent for service of process upon the Bank within New York State. Also attached as an Exhibit "B" is an official document of such designation, both of which were voluntarily prepared and voluntarily supplied by this Bank in its effort to do business within this State. The letter of January 15, 1971 is Exhibit "A".

ARGUMENT

Since the Bank voluntarily desired to do business in New York and thus voluntarily designated the Superintendent of Banks as agent for service of process, the Bank is bound by its previous actions.

No one forced the Bank to seek to do business in New York in 1971. This was a voluntary act. Section 131 of the New York Banking Law requires a foreign bank to designate the Superintendent of Banks as agent for service of process, before that foreign bank conducts business in New York.

The Banking Law goes even further than its counterpart in the Motor Vehicle Law wherein a foreign driver automatically designated the Secretary of State of New York as agent for service of process upon him in the event of a vehicle incident. Here, the Bank voluntarily executed and filed documents designating the Superintendent of Banks as agent for service of process in order to take advantage of permission granted by our State law to do business in this State.

If it were not for this submission to the jurisdiction of our Superintendent of Banks, the First National Bank of Boston would not be permitted to conduct business within the State of New York. The Bank cannot be heard to say that this designation of the Superintendent was an unfair infringement upon its rights and the Bank took full advantage of its right to now do business in the State of New York as if it were a New York corporation.

Those Banks which do *not* permit themselves to be qualified within New York, and do *not* designate the Superintendent *cannot* do business within the State. They are protected in service of process by the National Bank Act, §94, even though §94 has been looked upon by our Courts with *disfavor*. But our facts go further.

Chief Judge Friendly said in *Bruns, Nordeman* v. *American National Bank & Trust Co.*, 394 F.2d 300, 301 (2d Cir. 1968), that our Circuit would *reluctantly* follow those Courts which found that the National Bank Act of 1864 contained venue provisions which prevailed over those of the Federal Securities Acts.

> "We conclude with regret that the rulings upholding the claim of prevalence of the 1864 statute are right."

The New York Banking Law §200-b, paragraph 1, states in part:

> "An action or special proceeding against a foreign banking corporation may be maintained by a resident of this State for any cause of action."

Certainly, this statute was not designed to circumvent the National Bank Act, but to refer only to those foreign banking corporations which had become qualified to do business within New York.

Furthermore, §200 of the New York Banking Law refers to foreign banking corporations doing other bank related business in New York and to the requirement that such foreign banking corporations must file with the Superintendent of Banks a designation for service of process.

In *Milion* v. *National Bank of Greece*, 166 Misc. 190, 2 N.Y.S. 2d 155 (1938), affd. 253 App. Div. 650 (1939), the Supreme Court made it clear that the purpose of the requirement of the New York Banking Law to have a foreign bank desiring to do business in this State, designate the Superintendent of Banks, is to require those foreign banks to submit controversies growing out of that New York business to New York courts, so that New York residents having causes of action against them will *not* be required to seek out the Bank's distant home for enforcement of their claims.

In *Varga* v. *Credit Suisse*, 2 App.Div. 2d 596 (1956), 157 N.Y.S. 2d 391, the Court held that the purpose of the requirement of the New York Banking Law that foreign banking corporations doing business in the State appoint

the Superintendent as agent for service of process, is not to limit, but rather to expand and amplify opportunities for plaintiffs to effect service. Also to facilitate acquisition of jurisdiction *in personam* over defendant foreign banks in those cases where adequate methods of obtaining redress for a wrong might be not otherwise afforded, if the plaintiff had to go to the distant home of that foreign bank, despite a transaction within New York.

In *Milion, supra,* the Court went further and said that where a foreign bank regularly transacts business in New York through an agent or correspondent, the bank is not beyond the New York jurisdiction, where the correspondent designated the Superintendent or Secretary of State as agent for service of process.

The statute and cases make no distinction between those banks which are foreign national banks and those which are foreign state banks. Where they voluntarily qualify and voluntarily designate the Superintendent as agent for service of process, they have come under the jurisdiction of our Courts and are amenable to our service.

Examination of Exhibit "A" or Exhibit "B" fails to disclose any reservation of rights by The First National Bank of Boston or any limitation upon the type of process which may be served on it. In fact, Exhibit "B" is broad! It uses the following words:

> ". . . upon whom all lawful processes in any action or proceedings against this bank in New York may be served in like manner and with the same effect as if this bank existed therein."

This refers to *all* lawful process. It refers to *any action* or proceeding. It is limited of course, as the statute does, to New York situations, precisely as we have in the case at bar.

Conclusion

The First National Bank of Boston has voluntarily submitted to service of process in this State and designated the Superintendent of Banks as its agent for service. Long-arm rules of this State permit service to be made upon the Bank by long-arm directly at its Boston office, as an alternative to serving its agent for process in this State. Either could have been done. Either would have been effective to obtain jurisdiction over the Bank in this action in this Court.

For the above reasons, the motion to dismiss with respect to the Bank should be denied.

Respectfully Submitted,

IRA JAY SANDS

By: /s/ IRA SANDS

and

SAMUEL GOTTLIEB
GAINSBURG, GOTTLIEB, LEVITAN & COLE
Attorneys for Plaintiff
Office & Post Office Address
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Of Counsel:

IRA JAY SANDS
SAMUEL GOTTLIEB
STANLEY YAKER

To be argued by
SAMUEL GOTTLIEB, Esq.

United States Court of Appeals
For the Second Circuit

Docket No. 74-3025

HYMAN RADZANOWER,
Plaintiff-Appellant,
against

FIRST NATIONAL BANK OF BOSTON,
Defendant-Appellee,
against

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W. J. BRESNAN, H. J. SCHAFLY, LEONARD TOW, R. C. TODD, JR., B. P. SIMON, J. B. GREEN, L. H. READ, R. G. WILSON, H. E. FLAHERTY, B. D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R. F. LEWIS, P. L. LOWE, CHARLES LUCKMAN, M. B. MITCHELL, A. E. PUCKETT, J. H. RICHARDSON, M. E. LIVINGSTON and JACK WRATHER,

Defendants.

BRIEF FOR PLAINTIFF-APPELLANT

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BRIEF FOR PLAINTIFF-APPELLANT

Statement

Plaintiff appeals from an order entered in the United States District Court for the Southern District of New York, of Hon. Lloyd F. MacMahon, United States District Judge, dated October 21, 1974, granting the motion of defendant-appellee, First National Bank of Boston, dismissing this action as to it on the ground of improper venue (A-56-7*).

The Issue Presented

Defendant-appellee, First National Bank of Boston (herein Boston Bank) was named as a party defendant in this class action upon the ground that it conducted banking business in the State of New York and was involved with defendant Teleprompter and other defendants in the acts violative of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), the New York State Statute (Martin Act) and the common law; jurisdiction is based on §27 of the Exchange Act and pendent jurisdiction (A-15-30).

No challenge was presented to the sufficiency of the allegations (A-16-28) upon which liability against the defendants was asserted and upon which recovery was sought. Appellee's motion to dismiss was predicated solely "on the

* These numerical references are to the Joint Appendix. All emphasis supplied, unless otherwise indicated.

ground of improper venue" and was expressly granted on that basis (A-56-57).

The Opinion Below

In granting the motion to dismiss, Judge MacMahon ruled:

> "Absent waiver or consent, a national bank may be sued only in the district in which it is established. 12 U.S.C. Section 94; *Cope* v. *Anderson*, 331 U.S. 461, 467 (1947); *Klein* v. *Bower*, 421 F.2d 338, 342 (2d Cir. 1970); *Bruns, Nordeman & Co.* v. *American Nat'l Bank & Trust Co.*, 394 F.2d 300 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968); *Buffum* v. *Chase Nat. Bank of City of N.Y.*, 192 F. 2d 58 (7th Cir. 1951), *cert. denied*, 342 U.S. 944 (1952). Movant is established in Boston, Massachusetts, within the meaning of 12 U.S.C. Section 94, because its charter specifies Boston as its principal place of business. *Buffum* v. *Chase Nat. Bank of City of N.Y., supra*, 192 F.2d at 60; *Leonardi* v. *Chase Nat. Bank of City of N.Y.*, 81 F. 2d 19, 22 (2d Cir.), *cert. denied*, 298 U.S. 677 (1936); *Southeast Guaranty Trust Co.* v. *Rodman & Renshaw, Inc.*, 358 F. Supp. 1001, 1004 (N.D. Ill. 1973); *General Electric Credit Corp.* v. *James Talcott, Inc.*, 271 F. Supp. 699 (S.D.N.Y. 1966).
>
> Movant's designation of the New York Superintendent of Banks to receive process on its behalf is not a waiver of this venue provision. Although the language of the designation is broad, it specifically evidences an intent to comply with Section 131(c) of the New York Banking Law, which requires such a designation before a foreign bank can operate in a fiduciary capacity in New York. This designation operates as a waiver of the venue provision only in actions involving movant's fiduciary acts in New York, and no such acts are alleged or involved here.
>
> Accordingly, First National Bank of Boston's motion to dismiss this action on the ground of improper venue is granted in all respects." (A-56-7)

The Broad and Unlimited Designation by Appellee Boston Bank of the New York Superintendent of Banks to Receive Process in Its Behalf

> "Know All Men By These Presents that I, T. McLean Griffin am Cashier of the First National Bank of Boston, a national banking association located in the City of Boston, County of Suffolk, Commonwealth of Massachusetts, and organized under the laws of the United States of America. This Bank desires to transact business in the State of New York in conformity with Section 131(3) of the New York State Banking Law. The First National Bank of Boston hereby constitutes and *appoints the Superintendent of Banks, State of New York, and his successors in such office, to be the true and lawful attorney of this Bank in and for the State of New York, upon whom all lawful processes in any action or proceeding against this Bank in New York may be served in like manner and with the same effect as if this Bank existed therein.*
>
> The First National Bank of Boston hereby designates the undersigned, T. McLean Griffin, Cashier, and his successors in office, to be the appropriate officer of the Bank to whom process shall be forwarded by the Superintendent of Banks.
>
> /s/ T. McLean Griffin
>
> T. McLean Griffin, Cashier"
> (A-47)

It is our contention that since as the Court below noted "the language of the designation is broad", the claim of "improper venue" was and is untenable.

POINTS

I.

The New York Superintendent of Banks was broadly designated as the Boston Bank's agent "upon whom all lawful processes in any action or proceeding against this Bank in New York may be served in like manner and with the same effect as if this Bank existed therein."

Venue in this state was therefore proper. It was error to hold that the bank's intent was narrower than that indicated by the unlimited language of the designation it executed.

Although the "hardships sometimes imposed on plaintiffs" as a result thereof have caused §94 of the National Banking Act, as amended (12 U.S.C. §94) "to come under severe criticism",[1] we of course recognize that the "special and properly wide venue provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934" do not overcome the "special and exceedingly narrow venue provisions" of §94 of the National Banking Act (12 U.S.C. §94).[2] However, it is noteworthy that FRIENDLY, J., writing for this unanimous Court said: "[w]e conclude with regret that the rulings upholding the claim of prevalence of the 1864 Statute are right."[3]

1. *Southeast Guar. Tr. Co., Ltd.* v. *Rodman & Renshaw, Inc.*, 358 F. Supp. 1001, 1005; *Klein* v. *Bower*, 421 F. 2d 338, 342, 2 Cir. 1970; *Bruns, Nordeman & Co.* v. *American Nat Bank & Trust Co.*, 394 F. 2d 300, 302-4, 2 Cir. 1968; *Gen. Electric Credit Corp.* v. *James Talcott, Inc.*, 271 F. Supp. 699, 707, S.D.N.Y. 1966.
2. *Bruns, Nordeman & Co., supra.*
3. *Bruns, Nordeman & Co., supra.*

In the foregoing designation (p. 3, *supra*), it is stated: "[t]his Bank desires to transact business in the State of New York in conformity with Section 131(3) of the New York State Banking Law." The bank's Associate Counsel and Assistant Vice President in the moving affidavit below asserts "that solely in connection with its qualification pursuant to Section 131(3) of the Banking Law of New York to act in a fiduciary capacity in the surrogate's courts of the state and in other fiduciary capacities in the state, the Bank filed an instrument on January 15, 1971 appointing the Superintendent of Banks of the State of New York as its attorney upon whom all process could be served, in any action affecting or relating to an estate, trust or fund held or represented by it."

The Banking Law of New York does provide (Art. 3, §131, subd. 3), that a non-New York bank, as therein specified,

> "may act as trustee, guardian, executor, administrator, or in any other fiduciary capacity under any last will and testament or codicil thereto or other testamentary writing or under any deed of trust inter vivos or other written instrument establishing a trust, or by the appointment of any court of said state, may act in this state in any such fiduciary capacity, provided similar domestic corporations which have the power under the law of this state to act herein in any such fiduciary capacity, are permitted to act in like fiduciary capacity in the state where such foreign corporation has its domicile, provided that if such foreign corporation proposes to act in any fiduciary capacity in this state and to do so is required to file its qualification in the surrogate's court of this state, it shall file in the office

of the clerk of the surrogate's court of the county in which application for such appointment is pending

(a) a duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing such clerk and his successors its true and lawful attorney, *upon whom all process in any action or proceeding against such fiduciary, affecting or relating to the estate, trust or fund represented or held by such fiduciary or the acts or defaults of such corporation in reference to such estate, trust or fund* may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state, and (b) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office;"

and

"provided further that if such foreign corporation proposes to act in any other fiduciary capacity in the state, it shall file in the office of the superintendent (a) a duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing the superintendent and his successors its true and lawful attorney, *upon whom all process in any action or proceeding against such fiduciary affecting or relating to the estate, trust or fund held or represented by such fiduciary or the acts or defaults of such corporation in reference to such estate, trust or fund* may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state, (b) a written certificate of designation, which may be changed from time to time thereafter by the filing of a new certificate of designation, specifying the name and address of the officer, agent or other person to whom such process shall be forwarded by the superintendent, and (c) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office."

The designation executed by the bank (p. 3, *supra*) was of course *pro tanto* a waiver of its right to be sued only in the district in which it is established (12 U.S.C. §94). Had it been phrased in the limited terminology of the foregoing §131, subd. 3 of the New York Banking Law heretofore quoted and underscored, [italicized] the waiver would have unquestionably been limited to the service of process on the New York Superintendent of Banks in any action or proceeding against the bank as "fiduciary affecting or relating to the estate, trust or fund held or represented by such fiduciary or the acts or defaults of such fiduciary in relation to such estate, trust or fund" (p. 6, *supra*).

But the bank did not do so. The designation was in the unlimited and broad terminology specified in Art. 5 of the New York Banking Law treating with "foreign banking corporations and national banks", namely §200 thereof, which requires a foreign banking corporation other than a bank organized under the laws of the United States as a precondition to transacting banking business in this state to file a designation in the broad language of the instrument here executed.

The bank through its counsel who prepared the instrument claims that it did not intend to file a designation in the broad form which it was not required to do (A-32; p. 5, *supra*). However, it failed to do what the Chase National

Bank did in *Buffum* v. *Chase Nat. Bank of City of New York,* 192 F. 2d 58, 7 Cir. 1951, wherein it is pointed out that:

> "In this case there is no question but that defendant applied for and obtained leave to transact business in the state of Illinois for the limited purpose of 'acceptance and execution of trusts and receipt of deposits of trust funds in Illinois.' Though its original agent for service was authorized to accept service 'in all suits in Illinois,' *when he was replaced with another, the resolution creating the successor's authority provided that he should be the registered agent in matters involving the limited purpose for which defendant was qualified to do business in Illinois.* So our question in this respect is, did defendant, *by qualifying for the limited purpose of doing trust business in Illinois,* intend to waive its right to be sued in a transaction which on its face does not purport to grow out of such trust business?" (p. 61)

Defendant bank in *Buffum* "moved to dismiss upon the ground, amongst others, that under Title 12 U.S.C.A. §94, an action against defendant may be brought only in the Southern District of New York where it is located;" and that the Chase Bank "in complying with the foreign corporation laws of Illinois and consenting that it might be sued there" had "*limited its consent to transaction of business in Illinois only 'in connection with its acceptance and execution of trusts and to receive deposits of trust funds in Illinois.'*" (*Buffum, supra,* p. 59).

This defendant Boston Bank in effect asked the Court below to read into its broad designation the limited lan-

guage that was ultimately specifically used in *Buffum,* asserting that that was its intent. The admittedly broad language employed, we submit, does not manifest any such intent. In judicially determining a litigant's intent, as the New York Court of Appeals has consistently held, "we 'concern ourselves with what the parties intended, *but only to the extent that they evidenced what they intended by what they wrote.*'" And this notwithstanding that "the real intent of the parties" may have been otherwise (*Rodolitz* v. *Neptune Paper Prods.,* 22 NY 2d 383, 386-7, 1968; *Raleigh Assoc.* v. *Henry,* 302 N.Y. 467, 473).

The acts, activities and transactions in which the defendant bank allegedly was involved, participated in, aided and abetted, as alleged in the complaint, refer to matters in New York (A-16-28) and as was stated in the opposing affidavit below "[p]laintiff's position is that the designation by this defendant bank covers suits arising out of its business *conducted in New York.*" (A-52)

In view of the critical reluctance with which the venue limitation specified in 12 U.S.C. §94 has been applied, as heretofore indicated, we respectfully submit the learned Court below was not constrained to read into the broad language of the designation, the limiting language that did

not appear therein, notwithstanding that such in fact was the actual intent; especially since this record does not establish that in the period following the execution of the designation (January 15, 1971; A-47), defendant Boston Bank did not conduct any other banking business in the State of New York, except as a fiduciary in reference to an estate, trust or fund, etc., as specified in the Banking Law of New York, Article 3, §131, subd. 3. Surely, at least a hearing was warranted if any issue is presented in that regard. (A-23-25; A-32; A-52)

II.

The order dismissing the complaint on the ground of improper venue should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1975

75-
No. 268

HYMAN RADZANOWER,

Petitioner,

vs.

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W.J. BRESNAN, H.J. SCHAFLY, LEONARD TOW, R.C. TODD, JR., B.P. SIMON, J.B. GREEN, L.H. READ, R.G. WILSON, H.E. FLAHERTY, B.D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R.F. LEWIS, P.L. LOWE, CHARLES LUCKMAN, M.B. MITCHELL, A.E. PUCKETT, J.H. RICHARDSON, M.E. LIVINGSTON, JACK WRATHER, and FIRST NATIONAL BANK OF BOSTON,

Respondents.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SECOND CIRCUIT

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In The

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October Term, 1975

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Respondents.

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Petitioner finds it necessary to correct the serious misstatement in respondent bank's opposing brief (p. 4) that "for the first time petitioner seeks to smuggle an additional issue into the case and attempts to raise the question of whether the

mandatory venue requirement of Section 94 of the National Bank Act has been superseded by the venue provisions of the Exchange Act." The District Court opinion held unequivocally that "absent waiver or consent, a national bank may be sued only in the district in which it is established," citing §94 of the National Bank Act and the leading authorities so holding (App. A, 1a). Manifestly, we could not ask Judge MacMahon to overrule the decisions of the Second Circuit upon which he was bound to rely. However, as the bank's brief (p. 6) states:

> "The only time petitioner ever referred to the *Ronson* case, decided on August 15, 1973, was on May 23, 1975 at oral argument before the Court of Appeals. After petitioner's counsel called the court's attention to the *Ronson* case, Judge Mulligan specifically asked whether in light of *Ronson* petitioner was asking the Court of Appeals to reconsider and overrule its decision in the *Bruns, Nordeman* case, *supra.*"

Indeed, Samuel Gottlieb, Esq., co-author of the briefs here submitted, actually read an extract to the Court of Appeals from the opinion of the Third Circuit in *Ronson* and suggested that in light of that carefully considered opinion to the contrary by the Third Circuit, the matter at bar merited reconsideration, a suggestion that was summarily rejected by the Second Circuit. The oral transcript of the argument will so indicate and would not support the position taken by the respondent's brief (p. 6) when it indicates that "petitioner's counsel stated expressly that he was declining" to have the court do so. Thus, Second Circuit passed on the question in its summary affirmance.

We felt duty bound and indeed had no other recourse but to take that position, which it must be admitted, was an exercise in futility since the Second Circuit summarily affirmed on oral argument. It would have been equally futile in view of ***Bruns*** and other decisions rendered in the Second Circuit by other panels and a misuse of judicial economy, to have asked for rehearing or *en banc* determination.

Finally, we submit that the question here sought to be reviewed as a matter of law necessarily rises to the surface for consideration by this Court in view of the holdings below that the bank's "designation of the New York Superintendent of Banks to receive process on its behalf is not a waiver of the venue provision" of Section 94 of the National Bank Act barring suit in this state (App. A, 2a).

CONCLUSION

For all the reasons mentioned above, it is respectfully submitted that certiorari should be granted.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1975

No. 75-268

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petition for Certiorari Filed August 20, 1975, Certiorari Granted October 20, 1975

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Argument:

The broad public interest venue provisions of the Securities Act of 1933 (15 U.S.C. §77n(a)) and the Securities Exchange Act of 1934 (15 U.S.C. §78aa) prevail over and broaden the narrow venue provision of the National Bank Act (12 U.S.C. §94) when a national bank is sued for a securities act violation. 12

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OPINION BELOW

The opinion of the District Court is not reported. It is set forth in the Appendix at pp. 89a-91a. The judgment of the Court of Appeals is not reported; it is set forth in the Appendix at p. 94a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1975 (94a). The petition for a writ of certiorari was filed August 20, 1975 and granted on October 20, 1975. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

QUESTION PRESENTED

Do the more broad venue provisions of the Securities Exchange Act prevail over the restrictive venue provision of the National Bank Act or can they co-exist?

STATUTORY PROVISIONS INVOLVED

1. The venue provision of the National Bank Act (12 U.S.C. §94) provides:

> "Actions and proceedings against any association under this Chapter may be had in any district or territorial court of the United States held within

> the district in which such association may be established, or in any state, county, or municipal court in the county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

2. The general venue provisions of 28 U.S.C. §1391 provide:

> "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.
>
> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district wherein all defendants reside, except as otherwise provided by law.
>
> (c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue provisions."

3. The Securities Act (15 U.S.C. §77n(a)) provides:

> "(a) The district courts of the United States courts, and the United States courts of any

territory, shall have jurisdiction of offenses and violations under this sub-chapter and under the rules and regulations promulgated by the commission in respect thereto, and concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which defendant is an inhabitant or wherever the defendant may be found."

4. The Securities Exchange Act (15 U.S.C. §78aa) provides:

"The district courts of the United States, and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction over violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or

rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant . . . . "

5. The Banking Law of New York (Art. 3 §131, subd. 3) provides that a non-New York Bank, as therein specified:

". . . may act as trustee, guardian, executor, administrator, or in any other fiduciary capacity under any last will and testament or codicil thereto or other testamentary writing or under any deed of trust inter vivos or other written instrument establishing a trust, or by the appointment of any court of said state, may act in this state in any such fiduciary capacity, provided similar domestic corporations which have the power under the law of this state to act herein in any such fiduciary capacity, are permitted to act in like fiduciary capacity in the state where such foreign corporation has its domicile, provided that if such foreign corporation proposes to act in any fiduciary capacity in this state and to do so is required to file its qualification in the Surrogate's court of this

state, it shall file in the office of the clerk of the Surrogate's court of the county in which appointment is pending.

(a) a duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing such clerk and his successors its true and lawful attorney; upon whom all process in any action or proceeding against such fiduciary or the acts or defaults of such corporation in reference to such estate, trust or fund may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state, and (b) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office;"

and

"... provided further that if such foreign corporation proposes to act in any other fiduciary capacity in the state, it shall file in the office of the superintendent (a) a duly executed instrument in writing, by its terms of indefinite duration, and irrevocable, appointing the superintendent and his successors its true and lawful attorney; upon whom all process in any action or proceeding against such fiduciary affecting or relating to the estate, trust or fund held or represented by such fiduciary or the acts

or defaults of such corporation in reference to such estate, trust or fund may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state, (b) a written certificate of designation, which may be changed from time to time thereafter by the filing of a new certificate of designation, specifying the name and address of the officer, agent or other person to whom such process shall be forwarded by the superintendent, and (c) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office."

STATEMENT OF THE CASE

First National Bank of Boston ("Boston Bank") was included as a party defendant in this class action upon the ground that it conducted banking business in New York and was involved with defendant Teleprompter Corp. and other defendants in diverse security transactions violative of the Securities Exchange Act of 1934, the New York Martin Act and common law (Complaint, 13a). Jurisdiction was based on §27 of the Exchange Act and pendent jurisdiction. Boston Bank moved to dismiss on the grounds of improper venue (59a). No challenge was presented to sufficiency of allegations upon which liability against each defendant was asserted and upon which recovery was sought. The District Court on October 21, 1974 dismissed for improper venue (90a).

The New York State Banking Law provides (Art. 3 §131, subd. 3) that a non-New York Bank may act as trustee, guardian, executor, administrator or in other fiduciary capacity under testamentary writing or trust instrument, or by court appointment, provided similar domestic corporations having the power to act under New York law in such fiduciary capacity are permitted to so act in the state where the foreign corporation is domiciled, and upon condition that such foreign bank files with the Clerk of the Surrogate's Court, or in the office of the Superintendent of Banks, a written instrument of indefinite duration, irrevocably appointing such clerk or superintendent or their successors, its true and lawful attorney upon whom all process in any action or proceeding "against such fiduciary affecting or relating to the estate, trust or fund held or represented by such fiduciary, or the acts or defaults of such corporation in reference thereto" may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state.

Boston Bank on January 15, 1971 sent to the New York Banking Department:

> "A Power of Attorney executed by the First National Bank of Boston under date of January 15, 1971, designating the Superintendent of Banks of the State of New York or his successor, as agent for service of process, and further designating T. McLean Griffin, cashier, and his successors in office, as being the appropriate officer to whom process shall be forwarded" (79a).

That Power of Attorney specified that:

> "This Bank desires to transact business in the State of New York in conformity with Section 131(3) of the New York Banking Law. The First National Bank of Boston hereby constitutes and appoints the Superintendent of Banks, State of New York, and his successors in such office, to be the true and lawful attorney of this Bank in and for the State of New York, upon whom all lawful processes in any action or proceeding against this Bank in New York may be served in like manner and with the same effect as if this Bank existed therein" (77a).

The foregoing language did not limit in any manner the superintendent as designee for service of process (as Boston Bank could have provided by the statutory permissive language) to "any action or proceeding against such fiduciary (Boston Bank) affecting or relating to the estate, trust or fund held by such fiduciary" or its "acts or defaults" in reference thereto. Instead, the power was general and broad.

District Judge MacMahon, although noting that "the language of the designation is broad" (Opinion, 90a) held it did not operate "as a waiver of the venue provision" that a national bank may be sued only in the district in which it is established (12 U.S.C. §94), because the waiver thus narrowly construed did not embrace this lawsuit.

The venue provision of the National Bank Act was applied because Boston Bank is established in Boston, Massachusetts

and maintains no office or agent in New York and notwithstanding the undisputed fact that the activities and securities transactions in which Boston Bank participated and aided and abetted, as alleged in the complaint (14a), all took place in New York. It is noteworthy in this connection that Boston Bank failed to do what Chase Bank did in *Buffum v. Chase Nat. Bank of City of New York*, 192 F.2d 58, 61 (7th Cir. 1951). Chase had initially filed a designation authorizing its agent to accept service "in all suits in Illinois." When replaced by another, the replacement agent was authorized to accept service "in matters involving the limited purpose" for which Chase Bank "was qualified to do business in Illinois." Nonetheless, Judge MacMahon held that because Boston Bank "is established in Boston, Massachusetts, within the meaning of 12 U.S.C. Section 94," its broad designation "is not a waiver of this venue provision" (Opinion, 90a).

The Court of Appeals for the Second Circuit affirmed without opinion from the bench, undoubtedly because of the applicable decisions previously rendered by it and to which reference is hereinafter made.

SUMMARY OF ARGUMENT

The widespread and irreconcilable conflict among the circuits as to the conflicting venue provisions of the National Bank Act and the Securities Act and Securities Exchange Act should be resolved by declaring that the broad remedial provisions of the two Securities Acts prevail when a bank is sued for a securities violation.

The multiplicity of actions which result from suits against a bank in its distant district and against all other securities defendants in still another district, results in compounding judicial waste, conflicting adjudications, multiple trials (even with Judicial Panel) and often denies remedy to a victim of a securities fraud. Today, banks tend to be truly national in scope of their activities.

When the Bank Act provides that a national bank may only be sued where it is established, distant as that may be from the city where it operated openly as an alleged securities violator, and since the two Securities Acts provide that a defendant who violated the respective statutes may be sued wherever he be found or where his acts took place, a difficult problem arises in conflict. Petitioner suggests that in 1933 and 1934 Congress did not intend its remedial statutes to have such an inconsistent conflict favoring bankers in a climate then more concerned with the protection of the broader populace.

The Second Circuit in *Bruns, Nordeman & Company v. The American National Bank and Trust Company*, 394 F.2d 300 (1968) and the Ninth Circuit in *United States National Bank v. Hill*, 434 F.2d 1019 (1970) held that the National Bank Act venue prevails. The Third Circuit in *Ronson Corp. v. Liquifin Aktiengesellschaft*, 483 F.2d 852 (1973) later held that the Securities Acts were designed to prevail.

The commentators on the subject state that the Bank Act venue provisions are fundamentally unfair to and outside of equal protection and due process for the average plaintiff. In today's mobile society with banks so frequently crossing district

lines to compete and to conduct securities related activities, it becomes unjust for the victim damaged by banks in a New York securities transaction to travel to Massachusetts or Oregon perhaps (with attorney, records and witnesses) to air his suit.

ARGUMENT

The broad public interest venue provisions of the Securities Act of 1933 (15 U.S.C. §77n(a)) and the Securities Exchange Act of 1934 (15 U.S.C. §78aa) prevail over and broaden the narrow venue provision of the National Bank Act (12 U.S.C. §94) when a national bank is sued for a securities act violation.

I. Fundamental Fairness.

The instant issue primarily concerns venue under the 1934 Act. The 1933 Act venue provision is similar.

The 1934 Act, enacted as a remedial public interest measure, provides that every defendant in a securities related cause may be sued wherever the defendant be found or the operative deeds were performed. With the mores of the 1934 era, it seems clear that Congress was consumer concerned and the 1934 Act was clearly meant to supersede any earlier conflicting statute and to permit latitude of supervision over securities violations a subject of vast concern at that time.

The Second Circuit, *i.e., Bruns, Nordeman & Company v. The American National Bank and Trust Company, supra,* holds that the Bank Act prevails. The Second Circuit was not happy with this result. Judge Friendly stated:

> "We conclude with *regret* that the rulings upholding the claim of the 1864 Statute are right" (emphasis ours), 394 F.2d at 301.
>
> "[i]f we were writing on a clean slate we would not find it difficult to reconcile §94 of the National Bank Act with §22(a) of the Securities Act" (p. 303).

A later Second Circuit case. *Klein v. Bower,* 421 F.2d 338 (2nd Cir. 1970), simply followed *Bruns* without additional discussion of the problem. Judge Friendly, in *Bruns* found *"much practical appeal"* in the argument that securities law venue should control and he noted the *"heavy inconvenience for the plaintiff"* and the *burden on the federal courts* inherent in the holding. Although the securities law venue sections are special provisions, the court based its decision on Supreme Court cases holding that "where Congress has dealt with a particular venue problem — here actions against national banks — broader language in a general venue statute will not overcome this even though literally applicable." The court acknowledged that the venue provisions of the securities laws are special, but chose to ignore this argument as "too mechanical." It concentrated instead on legislative history of the securities laws.

It is impossible to ignore the fact that both sets of venue statutes here involved are special. One cannot discard the venue provisions of the securities laws on the theory that they are general. Venue statutes are special when they relate to a particular cause of action and to a particular class of persons. 1 Moore's, *Federal Practice,* Para. 0.144 (2d ed. 1974).

In *Bruns*, the Second Circuit went on to misinterpret intent of Congress in enacting the two securities laws. That court's assertion that Congress intended to subject national banks to the anti-fraud provisions, but not to special venue provisions provided to make the anti-fraud sections effective, is not convincing. No such conclusion is suggested by the regulation of national banks by the Comptroller of Currency. The comptroller is responsible for bank solvency and protection of depositors. He does not concern himself with protection of purchasers of securities. Any argument that regulation of banks by the comptroller will suffice to exempt banks from any provision of securities laws is scarcely tenable. In *S.E.C. v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959), this court rejected a similar argument concerning state regulation of insurance companies. There is no reason to believe that national banks are not totally subject to securities laws except to the extent specifically exempted by express *haec verba* provisions of securities laws.

The Ninth Circuit held that the National Bank Act venue prevails, *United States National Bank v. Hill*, 434 F.2d 1019 (1970).

However, the Third Circuit, in a well reasoned detailed opinion, has recently held that the 1934 Act venue controlled, *Ronson Corp. v. Liquifin Aktiengesellschaft, supra*, despite what it considered the facial conflict between the 1864 and 1934 Acts.

Other District Courts held that the Securities Acts venue prevail. For instance, in *Carpenter v. Hall*, 352 F. Supp. 806, 808 (S.D. Texas 1972) the court noted:

> "[t]he precise question is still open in the Fifth Circuit, but the Court is of the opinion that when the question is raised 'in that Circuit' the Court of Appeals will adopt the reasoning in Levin, supra (274 F. Supp. 974 D.N.J. 1967) and will hold that the 1934 Act controls."

The first case to apply securities law venue to national banks was *Levin v. Great Western Sugar Company*, 274 F. Supp. 974, 978 (D. N.J. 1967). The court there found implied partial repeal of the bank statute venue by the securities law venue. The *Levin* court found affirmative evidence from an examination of the securities laws that national banks were to be subject to the new venue provisions:

> "But another reason compels my decision here. A quick examination of the 1933 and 1934 Securities Acts will reveal that on a number of occasions, the legislative draftsmen found fit to exempt national banks and their securities from the provisions of the Act . . . . It becomes clear that the legislative draftsmen knew about national banks when writing their securities acts, and knew how to exempt them from provisions of the acts when they chose to do so. It would be an usurpation of legislative prerogatives for this court to impute an exception from the 1934 Act, in view of the background just described."

Thus, in *Levin*, the court discerned congressional intent to subject all persons to the broad venue of the securities laws.

The legislative history of the statutes is illuminating. The purpose of the Bank Act has been expressed as an enactment for protection and convenience of national banks; to reduce interruption in their business from their records being sent to distant districts in obedience to process (prior to the modern miracle of Xerox or airplane). Anno: *Venue Provisions of National Bank Act* (12 U.S.C. §94), *as Affected by Other Statutory Provisions Governing Venue,* 10 A.L.R. Fed. 940, 943.

National banks are federal instrumentalities. The power of Congress over them is extensive. *Mercantile National Bank at Dallas v. Langdeau, Receiver,* 371 U.S. 555 (1963). The Bank Act was first enacted in 1863 and replaced a year later. Although amended a few times, the narrow venue provision has remained unchanged. Section 11 of the Bank Act provides banks with power to sue or be sued as natural persons. Although a bank is not limited as to where it may sue, it is only provided special privilege when being sued.

The Bank Act venue provision is not specifically known to have been considered by Congress when it enacted the Securities Acts in 1933 and 1934. The venue provision of the 1934 Exchange Act was originally authored in Section 27 of H.R. 9323. It cleared through Congress without significant change. It is petitioner's contention at bar, that Congress' silence evidences its intent, in 1934, to impose the venue provisions of the 1934 Act on all involved, without excepting banks. This added a further venue to bank-securities cases.

The court in *Ronson, supra,* was of similar opinion at 854:

> "We are guided by the realization that the Securities Exchange Act must be liberally interpreted in order to accomplish the congressional objects of regulating the securities market and of affording proper disclosures to the investing public, as well as preventing fraud in securities trading. In recognition of the national rather than local nature of transaction involved, Congress enlarged the applicable venue and service of process requisites. An unduly narrow ruling on venue could not inhibitand reduce the effectiveness of the remedies provided by the Act."

Ronson further said at 854:

> "Indeed we note, as did the Court in *Levin v. Great Western Sugar Company, supra,* that when it drafted the Act, Congress was aware that certain portions might be construed as applicable to banks and proceeded to make specific provisions for them. The absence of such an exception in the venue section speaks forcefully for the proposition that the banks also were to be affected by its more expansive sweep.
>
> "Further evidence that in the securities field Congress intended the special jurisdiction and venue section of the Act to be complete and exclusive, may be found in the fact that power to hear cases arising under the statute was vested in

> the federal courts only as contrasted with the Banking Act which allowed litigation in state as well as the United States Courts."

Petitioner submits that the statutes must be construed together. The rule of *in pari materia* is a reflection of practical experience in interpretation of statutes. A legislative body generally uses a word with a consistent meaning in a given context. The rule is but a logical extension of the principle that individual sections of a single statute be construed together. There is necessarily the presumption that when Congress enacts a new statute, it acts fully aware of all previous statutes touching the same subject. *Erlenbaugh v. United States,* 409 U.S. 239 (1972). Therefore, it must be presumed that when Congress enacted the 1933 and then the 1934 Acts, it was fully aware of the 1864 National Bank Act and Congress did not intend to carve out of these remedial securities statutes that exception to the new broad public interest venue provisions but rather to enlarge the forum choice.

Statutory interpretation requires more than concentration upon isolated words; rather significant consideration must be given to the total corpus of pertinent law and to policies which may have inspired what could be ostensibly termed by an advocate, as even inconsistent provisions. *Boys Market, Inc. v. Retail Workers Union,* 398 U.S. 235 (1970). Congress must be afforded the presumption of consistent and thoughtful action rather than a suggestion of absence of clarity.

The depression policies and remedial climate which led to the two Securities Acts and other acts of that era are well

known. Congress clearly intended to provide a broad civil remedy for persons damaged by securities fraud and to make it less convenient for those in a position to commit fraud. It makes no difference if a bank is involved. Respondent cannot point to any material exception made by the Congress for a bank.

In *Carpenter v. Hall, supra,* the court cited the importance of the policy represented by the securities laws and noted the following statement by the Fifth Circuit in *Lehigh Valley Trust Co. v. Central National Bank of Jacksonville,* 409 F.2d 989, 993 (5th Cir. 1969):

> "That Congress made no express general exception for banks under the fraud provisions of either the Securities Act of 1933 or the Securities Exchange Act of 1934 indicates that Congress did not intend any such exemption."

The *Carpenter* court concluded from this that "since national banks are subject to the fraud provisions of these Acts, so also are they subject to the special venue provisions." The *Carpenter* court, *supra* at 811, was aware of the opinion of Judge Friendly in *Bruns:*

> "In reaching these conclusions, the court has carefully considered the perceptive and scholarly opinion of Judge Friendly . . . especially noting Judge Friendly's reasoning that in enacting the 1934 Act, Congress could hardly have anticipated that 'a national bank might join in a violation of Section 10(b).' The Court must respectfully differ

> with such conclusion. The decisions in this Circuit show decisively that the Congressional purpose of the Exchange Act was 'broad' and does not permit its restriction by a supposition that in 1934 Congress could not have anticipated that the bank might do those things that have been charged against the bank in this action."

Attempts to explain away these decisions cannot bear scrutiny.

It is not even necessary to find an implied repeal here.

Examination of the Supreme Court cases which have dealt with the bank venue issue discloses that none suggests that an implied repeal is involved here. The only discussion in those cases of implied repeal was concerned with a later venue provision on the same subject. The reason for this lack of discussion of implied repeal is apparent once the Bank Act is understood for it need not be found that the Bank Act creates securities immunity for national banks. It is a statute which allows national banks to be sued. Hence, when securities laws were later enacted, the venue provisions of the securities laws simply added additional forums where national banks may be sued.

Even if the Bank Act venue were mandatory, it does not mean that other venue statutes cannot apply also. It is not exclusive when another special venue statute also literally applies. Unlike substantive provisions, different venue statutes applicable in the same action need not be in conflict; they may

be supplementary. Special Bank Act venue has been held to exclude application of the general venue statute to national banks. But there is no conflict between the general venue statutue and the Bank Act because special governs general, and because general only applies "except as otherwise provided by law."

Here, on the other hand, Congress specifically acted in both cases. Respondent would have the courts partially strike down one of the venue provisions. It would be more appropriate for this Court to harmonize the Bank Act venue and the securities law venue by making each fully effective within their sphere.

Because of paucity of authority concerning conflicts between special venue statutes, analogy is appropriate. Federal question jurisdiction and diversity of citizenship jurisdiction are not in conflict because each is a separate grant. Neither diminishes the other. Each special venue statute is a special grant by Congress of a forum. If more than one venue applies, plaintiff has benefit of both. 92 C.J.S., *Venue,* Sections 64-70, 106. Unless these venue statutes are irreconcilable, the court is under a duty to harmonize. Here harmony is achieved by allowing each to fully operate. Plaintiff may be considered to have selected as his choice to invoke the venue of the securities laws, rather than that of the Bank Act. Nowhere is it written that Congress may not authorize venue against national banks in more than one place.

The analogy to jurisdiction is particularly compelling. In *Burns v. American National Bank and Trust Company,* 479 F.2d 26 (8th Cir. 1973), noted at 59 Iowa Law Review 1030

(1974), a national bank contended that the final sentence of 28 U.S.C. Section 1348 which states that for purposes of civil suit national banks are citizens of the states in which located, eliminated federal jurisdiction over national banks except under 28 U.S.C. Sections 1331 and 1332. The Eighth Circuit held that under 28 U.S.C. Section 1348, national banks were subject not only to diversity and to general federal question jurisdiction, but also to special federal question jurisdiction under 28 U.S.C. § 1337. Significantly, the court *en banc*, saw no reason to concern itself with standards for implied repeal, because nothing had been repealed. The court recognized that jurisdiction may be several and when two grants of jurisdiction are made, both apply.

II. Even if there were repugnancy, standards for partial implied repeal are fully met.

If there is repugnancy, securities law venue should control. It is last in time. *Posadas v. National City Bank*, 296 U.S. 497 (1936). Unless both venue statutes can exist together, repugnancy is present.

The *Levin* court stated at 978:

> "As was pointed out in *Talcott*, it is true that, as a general rule, implied repeals of previous legislation are not favored, and are to be found only when two statutory provisions are totally repugnant to each other. Agreed that this is the case, I still find that section 94 of Title XII and section 78aa of Title XV *are* totally repugnant to

> one another. It is clear that if section 94 prevails, the moving defendant banks can be sued only in California; if section 78aa prevails, suit is permissible here. Such a conflict constitutes total repugnancy."

With two special venue statutes, there can be no reconciliation unless both are held fully applicable. This Court, however, is not required to destroy the Bank Act venue if it finds inconsistency. It need only carve out a limited exception. In most cases, banks may retain their xenophobic venue except for the securities laws.

In *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) for example, involving intersection of a broad federal regulatory scheme under securities laws and equally broad free competition commands of anti-trust laws, (both motivated by the strongest of public policies), this Court must have recognized that its holding would have extensive impact on many aspects of the intersection of those statutory schemes. This Court found the correct analysis to be reconciliation of the two schemes, with neither being "completely ousted." *Silver* did not present a case which enabled this Court to confine its holding to creation of a specific and narrow exception, as at bar. Therefore, this Court seemed constrained to determine whether the regulatory system of securities laws as a whole could be workable if the anti-trust laws were to apply. Finding immunization from anti-trust scrutiny not necessary to make the securities laws work, this Court found no implied repeal of anti-trust provisions as they related to securities exchanges.

But at bar, unless construction of the Bank Act permits utilization of the securities venue as well, we have a different situation. The system of bank regulation has never been thought to generate conflict with securities laws. Bank regulation, concerning largely protection of depositors, has left to the securities laws the protection of investors. Only in the narrow area of venue may a colorable conflict be perceived. Such a supposed conflict, unlike that in *Silver*, need not have repercussions for the banking and securities regulatory systems as a whole.

The Bank Act was enacted in 1864. There was no regulation of securities at that time. Seventy years later, Congress enacted securities law to regulate investment practices. A consideration of policies inherent in the two venue provisions conclusively demonstrate supremacy of securities law venue. The early cases indicate that the reason for the narrow limitation for banks was need to maintain books and records at its principal place of business, to preserve bank records from hazard of subpoena to remote litigation. *First National Bank of Charlotte v. Morgan*, 132 U.S. 141 (1889).

The securities laws on the other hand, were to provide broad pervasive regulation of the nation's financial resources. At a time of grave economic dislocation, Congress observed crying abuses and set out to correct them with strong remedial statutes. Included in the securities laws were provisions to expedite securities litigation. International service of process, broad jurisdiction and venue, and stringent liability provisions were included to insure that the new laws would be effective to correct the perceived abuses. An intent to pierce the thicket of federal

jurisdiction and venue rules is apparent on the face of the securities laws. Legislative intent resides not only within documents which purport to be "legislative history," but also in intent which plainly appears on the face of the statutes.

Comparison of the relative policies of the Acts here makes respondent's position of bank venue supremacy untenable. In this age of photostatic duplication and computer, Boston Bank's records are not threatened, respondent has not been so disingenuous as to suggest that stability of Boston Bank's business is at stake. Against the narrow construction of the Bank Act, so attenuated by the march of progress, must be weighed the continuing needs for regulation of securities. The policy of securities regulation is substantially furthered by laying venue broadly.

The center of gravity of this case lies within the concepts and regulatory norms of the securities laws. Boston Bank by its unlawful participation with others in securities frauds in the Southern District of New York has become accountable in that district. Justice requires that a narrow construction of the Bank Act not block proper litigation.

It is true as respondent states that in *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963) and *Michigan National Bank v. Robertson*, 372 U.S. 591 (1963), this Court held pursuant to 12 U.S.C. §94, that a bank may only be sued where it is established. However, in those cases this Court was not confronted with violation of the 1934 Act and its own independent venue clause. In fact, in *Michigan National Bank* at 595 (concurring opinion by Mr. Justice Black), it was said that it

is impossible to defend a statute "that would require a plaintiff to go to another state hundreds of miles from home to bring suit for a wrong done him in a transaction in his own state. . . ."

The Supreme Court has never, we believe, considered a case involving two special federal venue statutes. Some involved National Bank venue and the general venue statute; others, bank venue and a state statute. The case at bar is much different and novel; here two special federal venue statutes are involved. In *General Electric Credit Corp. v. James Talcott, Inc.*, 271 F. Supp. 699, 701 (S.D.N.Y. 1966) the court stated:

> "It does not appear that there are any cases involving a direct conflict between the venue provision of the National Bank Act and that of another special federal venue statute. Accordingly, this case is one of first impression." (See also Opinion, fn. 2).

In *Ronson Corp. v. Liquifin Aktiengesellschaft, supra,* the court observed:

> "The *Bruns* opinion referred to the cases of Mercantile National Bank v. Langdeau, 371 U.S. 555, 83 S. Ct. 520, 9 L. Ed. 2d 523 (1963), and Michigan National Bank v. Robertson, 372 U.S. 591, 83 S. Ct. 914, 9 L. Ed. 2d 961 (1963), which dealt with conflicts between state venue acts and the National Banking Act. But in those discussions the Supreme Court was not considering the effect of the special venue section

> of the Securities Exchange Act. The differences between the two situations are obvious, and we think that the cases cited are not controlling in the present situation."

This Supreme Court is not bound by prior decision. In this determination the court may wish to consider similar cases from other circuits.

The cases cited by respondent on page 8 of their Brief in Opposition to Certiorari do not shed light. *Keppner v. United States,* 195 U.S. 100, 125 (1904) is inapposite. At bar, the specific area of the 1934 Exchange Act would control over the broad wording of the Bank Act. The Bank Act had attempted to cover all suits against a bank whether it be contract, tort or the like. The 1934 Act covers solely securities related actions. Thus venue for non-securities bank violations was not enlarged by the 1933 or 1934 Acts.

Rodgers v. United States, 185 U.S. 83, 88 (1902) contains language applicable to this case:

> "or unless the provisions of the general are manifestly inconsistent with those of the special."

At bar, the venue provisions of the 1934 Act are manifestly inconsistent with the Second Circuit's interpretation of congressional intent. That Honorable Court would read in added exception language which is nowhere present. Had Congress desired any "saving" language for the 1864 venue

limitation to be applicable to securities actions, it would have specifically added such.

Stonite Products Co. v. Melvin Lloyd Co., 315 U.S. 561, 566 (1942) is vastly different in approach and concept from the case at bar. There the Patent Act of 1897 was a *later* restrictive measure limiting a *prior* venue provision. At bar, the Exchange Act is a subsequent broader venue statute.

As stated, *supra*, when Congress enacted the 1934 Act it is presumed to have been fully aware of the National Bank Act. Thus, the unrebutted presumption is that Congress intended to now provide a broader venue by enacting the subsequent act with no restriction or saving clause on the point.

Fourco Glass Co. v. Transmirra Corp., 353 U.S. 222 (1957) considered whether there had been changes in the Judicial Code to negate *Stonite*. This Court held that the revision in 1948 did not affect viability of *Stonite*. *Stonite* dealt with a *subsequent* limiting venue statute. At bar we are dealing with *prior* limiting venue language broadened by a recognized remedial set of statutes in remedial days.

The cases cited by respondent are notable for lack of rationale and failure to discern that Supreme Court decisions on this question have never involved two special venue statutes or in some citations, no connection with securities law. The venue provision of the Bank Act has been severely criticized by commentators. For instance, the *American Law Institute, Study of the Jurisdiction Between State and Federal Courts*, (1969), states at p. 413:

> "There is no obvious reason why a national bank needed a restrictive venue rule or could not be treated as other corporations, and that a statute which would require a plaintiff to go to another state in order to bring an action for a wrong done to him in a transaction in his own state could not be defended."

The *Institute* continues at 413:

> "The statute ought to be repealed, and the Institute so proposes."

Also, *An Assault on the Venue Sanctuary of National Banks*, 34 George Washington Law Review 765 (1966).

There is logical reason for this. To allow a bank to enter a distant district, damaged a plaintiff and retreat to sanctuary of its own district when a party seeks relief, works injustice.

Indeed, the Bank Act may even violate the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

> "All general terms in statute should be limited in their application so as not to lead to oppression, if that is possible." *(Carlisle v. United States*, 16 Wall 147 (1878)).

Therefore, the venue provision of the 1934 Act must be construed to be in addition to or to limit those of the Bank Act

when applicable to securities violations. No longer as in 1864, was it necessary or advisable to protect and foster national banks who had by 1933 (more by 1975) truly become "national" in scope of affairs.

In this case, Radzanower who was damaged in New York by Boston Bank is required to travel to Boston, Massachusetts to obtain relief. This would impose an onerous burden upon him and be so oppressive that he may not be able to maintain two lawsuits, one in New York and one in Boston. No statute was intended to have such a result.

III. Judicial Economy.

Respondent's view of the Bank Act would thus run contra to consideration of judicial economy. When principles of Multidistrict Litigation, 28 U.S.C. §1407 become involved, the result can become further burdensome.

When a national bank is sued in a securities related cause, it must be separated from all other defendants and tried separately in its home district, no matter where that may be. When there are several national banks from different districts, as in a debenture registration, each must be sued separately in its separate district. Under 28 U.S.C. §1407, the suits may be consolidated in one district for pre-trial administration, but trials each must later take place in each bank's home district.

There is presently a matter pending in the Southern District of New York which provides clear example of the problem; *Stirling Homex v. Chemical National Bank, et al.*, 74 Civ. 64-66

(DB). In *Stirling*, the Judicial Panel on January 28, 1975 (Slip Opinion J.P.M.L. Docket No. 133) filed an opinion which disclosed that nine national banks were sued by Stirling in numerous districts in separate suits for violating federal securities laws and common law by falsely representing their intention to extend credit to Stirling. Similar complaints were used. The Panel in its footnote no. 1, p. 1 comments on this:

> "Since venue against four of the defendant banks was proper only in the banks' home districts, 12 U.S.C. §94, plaintiffs were forced to file these virtually identical actions in four different districts."

The Panel ordered pre-trial held in the Southern District of New York, pursuant to 28 U.S.C. §1407 and commented that the venue provision of 12 U.S.C. §99 does not affect this. However, trial of the four actions must be later held in four different districts.

This leads to waste and duplication of judicial effort. It could result in inconsistent adjudications. With judicial calendars so encumbered in recent years, four separate trials will become necessary solely because of this interpretation of the Bank Act v. 1934 Act venue provision.

Another example is *In re Great Western Ranches Litigation*, 369 F. Supp. 1406 (J.P.M.L. 1974). Great Western filed a petition for reorganization in the Northern District of California. Shortly thereafter, one original incorporator filed action in the same district charging violation of federal securities

laws. The trustee filed yet another action in the Northern District of California adding as a defendant, The First National Bank of Montana. The California court ordered the action against the bank severed and transferred to Montana pursuant to 12 U.S.C. §94. The Judicial Panel ordered the suit against the bank consolidated with the California claims for pre-trial purpose only, saying at footnote 1, p. 1406:

> "The operation of 12 U.S.C. §94 does not preclude transfer under 28 U.S.C. §1407 because the latter is not encumbered by venue considerations. The transfer under Section 1407 is only for coordinated or consolidated pre-trial proceedings. Trial of this action will still take place in the District of Montana."

Thus the trial of all the causes, excepting against the bank, will be held in California. The bank had the privilege of retreating to its home district. This again is waste of judicial economy, and could lead to inconsistent adjudications.

Lawmakers are presumed to intend to enact legislation which avoids unwieldly, inconsistent or cumbersome results. Another example of cumbersome results this venue problem does cause when interpreted to insulate national banks, is demonstrated by *In re Westec,* 307 F. Supp. 559 (J.P.M.L. 1969). Westec filed in the District Court for the Southern District of Texas a petition for appointment of a trustee under Chapter X of the Bankruptcy Act. He commenced an action in the Southern District of Texas on behalf of Westec, the creditors, and a class consisting in part of stockholders, naming

93 individual and corporate defendants. Twenty related actions were filed in the Southern Districts of Texas and New York, one New York defendant being Chase National Bank. All actions in New York except for the one against Chase and another were transferred to Texas, pursuant to §1404. The action against Chase was severed and remained in New York. The Judicial Panel then transferred the New York-Chase action to Texas for pre-trial (fn. 8, p. 562). The trial against Chase would have still been held in New York, if not for settlement.

The concept of the Judicial Panel was to increase judicial efficiency. Yet, the venue of the Bank Act, as it was construed below at bar, hinders that objective. All that §1407 accomplishes is to consolidate the bank's action with the others for pre-trial alone.

The securities violation problem of the the Bank Act is most prominent in the case at bar. Respondents' view would require that at least one action be filed in New York, where most activities took place and where most defendants are located, plus one in Boston, where a complete trial would be required involving the New York named defendants as non-party violators (perhaps not even liable to subpoena and similar trial needs). This does no more than add burden to plaintiff and the judicial machinery with witnesses, records and attorneys traveling to two separate locations, with separate judges and dockets.

IV. Boston Bank through its conduct has waived any venue privilege.

Wholly apart from proper interpretation of the Bank Act and venue provisions of the securities laws, is the issue here of waiver. The complaint alleges numerous transactions by Boston Bank in the Southern District of New York and its broad power of designation of agent for broad service. These acts and transactions constituted a waiver of any venue privilege. Venue is a personal privilege which may be waived by conduct. See *Waiver by National Bank of Statutory Right to be Sued in District Where Established or in Which It is Located,* 1 A.L.R. 3d 904. Also, *First Charlotte National Bank v. Morgan,* 132 U.S. 141, 145 (1889). This annotation contains a fairly complete listing of cases dealing with waiver of venue by national banks.

The earliest case to consider this question, *Continental National Bank v. Folsom,* 3 S.E. 269 (Ga. 1887), held that where a national bank entered the jurisdiction, filed a lawsuit, and posted bond, it had waived its right to be sued elsewhere on that bond. This rule was followed in *Okeechobee County v. Florida National Bank,* 150 S. 124 (1933); *Lichtenfels v. North Carolina National Bank,* 132 S.E. 2d 360 (N.C. 1963); *Michigan National Bank v. Superior Court,* 23 Cal. App. 3d 1, 99 Cal. Rptr. 823 (1972); *Security Mills of Asheville, Inc. v. Wachovia Bank and Trust Company,* 189 S.E. 2d 266 (N.C. 1972); *Fisher v. First National Bank,* 338 F. Supp. 525 (S.D. Iowa 1972).

See also *Buffum v. Chase National Bank, supra.*

Although two decisions hold against petitioner's position on waiver *(Exchange National Bank of Chicago v. Rock,* 197 S.2d

52 (Fla. App. 1967), and *Prince v. Franklin National Bank,* 310 N.Y. Supp. 2d 390 (N.Y. Supreme Ct. 1970)) we believe them wrongly decided. Each contains little more than a sentence on this subject. Since Boston Bank went well beyond the limited authority it had obtained in New York and conducted activities in this district not unique to banks, it waived any special privilege even under its own interpretation of the applicable statutes. Its activities here were remote from those the 1864 Congress envisioned national banks participating in.

CONCLUSION

For the reasons detailed, it is respectfully submitted that the judgments of the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York, should be reversed with directions that the motion to dismiss on the ground of improper venue be denied.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

75-

No. 268

HYMAN RADZANOWER,

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vs.

THE FIRST NATIONAL BANK OF BOSTON,

Respondent,

and

TOUCHE ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAVER, W. J. BRESNAN, H. J. SCHAFLY, LEONARD TOW, R. C. TODD, JR., B. P. SIMON, J. B. GREEN, L. H. READ, R. G. WILSON, H. E. FLAHERTY, B. D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R. F. LEWIS, P. L. LOWE, CHARLES LUCKMAN, M. B. MITCHELL, A. E. PUCKETT, J. H. RICHARDSON, M. E. LIVINGSTON, and JACK WRATHER,

Defendants.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT

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IN THE

Supreme Court of the United States

October Term, 1975

No. 268

HYMAN RADZANOWER,
Petitioner,

vs.

THE FIRST NATIONAL BANK OF BOSTON,
Respondent,

and

TOUCHE ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W. J. BRESNAN, H. J. SCHAFLY, LEONARD TOW, R. C. TODD, JR., B. P. SIMON, J. B. GREEN, L. H. READ, R. G. WILSON, H. E. FLAHERTY, B. D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R. F. LEWIS, P. L. LOWE, CHARLES LUCKMAN, M. B. MITCHELL, A. E. PUCKETT, J. H. RICHARDSON, M. E. LIVINGSTON, and JACK WRATHER,
Defendants.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT

Questions Presented

(i) Whether section 94 of the National Bank Act (12 U.S.C. §94) has been impliedly repealed by the venue provisions of section 27 of the Securities Exchange Act of 1934 (the "Exchange Act") (15 U.S.C. §78aa)?

(ii) Whether The First National Bank of Boston, which is established in Boston, Massachusetts, waived the mandatory venue provisions of section 94 of the National Bank Act by qualifying, under section 131(3) of the New York Banking Law, to engage in limited fiduciary activities in the State of New York?

Statutes Involved

Section 94 of the National Bank Act (12 U.S.C. §94) provides:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

Section 27 of the Exchange Act (15 U.S.C. §78aa) provides in pertinent part:

> "Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

Section 131(3) of the New York Banking Law is set forth in an Appendix hereto.

Statement

The First National Bank of Boston (the "Bank") is a national banking association organized and existing under the laws of the United States. See 12 U.S.C. §§12-78 (1970). The Bank, which is established in Boston, Massachusetts, was named as a defendant in this action and moved, pursuant to Rule 12(2) and (3), Fed. R. Civ. P., for an order dismissing the action as to it on the ground that venue in the Southern District of New York is improper. The Bank's motion was granted by the United States District Court for the Southern District of New York, and judgment entered thereon. (A. 89a) The court found that the Bank is established in Boston, Massachusetts, and hence could be sued only in the United States District Court for the District of Massachusetts. The United States Court of Appeals for the Second Circuit, in open court and without opinion, affirmed the judgment of the District Court. (A. 94a)

The complaint in this alleged class action purports to assert claims against TelePrompter Corporation ("TelePrompter"), an issuer of common stock traded on the New York Stock Exchange; Touche Ross & Co., TelePrompter's independent auditors; 22 individuals who are or were officers and/or directors of TelePrompter;* and the Bank, as agent bank with respect to a $150 million Revolving and Term Credit Loan, dated as of April 26, 1973. Petitioner challenges the accuracy of various press releases, reports and financial statements issued by Tele-

* Defendant TelePrompter and the other defendants listed as such in the caption above were not parties to the proceeding in the United States Court of Appeals for the Second Circuit, and have no direct interest in the outcome of this proceeding.

Prompter during 1973. It is claimed that information disseminated by TelePrompter to the public violated section 10b of the Exchange Act, 15 U.S.C. §78j(b), the statutes of the State of New York and the common law. Venue is based on section 27 of the Exchange Act, 15 U.S.C. §78aa.

The complaint purports to charge a violation of Rule 10b-5, 17 C.F.R. §240.10b-5, promulgated by the Securities Exchange Commission (the "Commission"). It is alleged that the defendants "aided and abetted TelePrompter . . . and/or joined or participated in one continuous course of conduct and plan of action" (A. 23a), and failed adequately to disclose information with respect to certain financial difficulties being experienced by TelePrompter.

Specifically, it is alleged that the Bank, as a lender to TelePrompter, had "*fiduciary obligations to the investing public*" (italics added) to disclose to and notify the Commission, the New York Stock Exchange and the public generally of certain information which had come to its attention as a lender to TelePrompter, which was inconsistent with particular statements made by TelePrompter concerning its financial condition. (A. 23a-24a)*

* Petitioner assumes that venue in the Southern District of New York is proper. However, assuming *arguendo* that the Bank owed petitioner, as well as other shareholders of TelePrompter located throughout the United States, a duty to notify the Commission, the New York Stock Exchange and the investing public of inaccuracies and omissions in public information disseminated by TelePrompter, such duty was breached only in Boston, Massachusetts—the district wherein the Bank is established. Any communication with the Commission or the New York Stock Exchange would necessarily have emanated from the Bank's headquarters in Boston, Massachusetts. Thus, petitioner cannot establish that venue under section 27 of the Exchange Act is proper in the Southern District of New York. As a consequence, no conflict between that section and section 94 of the National Bank Act is presented by this action.

Petitioner concedes the Bank is "established" within the meaning of section 94 of the National Bank Act in Boston, Massachusetts, and that it maintains no office or agent in New York. However, petitioner now asserts, as he did in the lower courts, that the Bank waived the provisions of section 94 of the National Bank Act by conducting banking business in New York State. This asserted waiver is alleged to have occurred on January 15, 1971, when the Bank, as a foreign bank, qualified pursuant to section 131(3) of the New York Banking Law to perform certain limited fiduciary activities in New York State with respect to the administration of trusts and estates. The lower courts found to the contrary.

At no time did petitioner dispute, either in the District Court or in the Court of Appeals, that venue in this action with respect to the Bank is determined by section 94 of the National Bank Act.

Summary of Argument

Petitioner now seeks—and for the first time—to raise the issue of whether the venue provisions of section 94 of the National Bank Act have by implication been repealed *pro tanto* by the venue provisions of section 27 of the Exchange Act.* This issue was never raised in the District Court nor was it reviewed by the Court of Appeals. On the foregoing, we respectfully submit that certiorari was improvidently granted by this Court.

Petitioner has utterly failed to establish a clear and manifest intent on the part of Congress to repeal by impli-

* Petitioner and the Commission refer in their briefs to the Securities Act of 1933. However, this action presents no issue involving the venue provisions of that Act.

cation the venue provisions of the National Bank Act. Similarly, he has failed to establish that there is a positive repugnancy between the venue provisions of the National Bank Act and those of the Exchange Act. Petitioner and the Commission, as *amicus curiae,* rely on speculation and advert to specious policy arguments, which have heretofore been rejected by this Court, in an effort to establish that section 94 of the National Bank Act has been impliedly repealed by section 27 of the Exchange Act. Such arguments merely obscure the issues presented to this Court. Petitioner fails to offer any convincing reason as to why the venue provisions of the National Bank Act and the Exchange Act cannot co-exist, as indeed they can, and have for over forty years.

It is abundantly clear from this Court's recent decisions that the venue requirements of the National Bank Act are mandatory in their application to suits against national banks. This rule applies even though petitioner can satisfy the venue requirements of the Exchange Act. Any judicial change in the venue provisions of the National Bank Act would be inappropriate and an incursion upon the legislative prerogatives of Congress. National Banks have sought and obtained their charters and thereafter acted on the assumption that section 94 is fully effective.

Petitioner asks this Court to take judicial notice of what he considers to be the overriding national importance of the Exchange Act and thereby to repeal the venue provisions of the National Bank Act, which in petitioner's own subjective view are of minor importance. It is submitted that such reasoning cannot serve as a basis for finding a repeal by implication. This Court and almost all of the lower federal courts which have construed the venue provisions of the National Bank Act have concluded that any change in these provisions should be made by Congress.

ARGUMENT

POINT I

The venue requirement of the National Bank Act is mandatory in application and takes precedence over the venue provision of the Exchange Act in suits against national banks.

Section 94 of the National Bank Act is mandatory and requires that all transitory actions against a national bank be brought in the district in which it is established. *Mercantile National Bank* v. *Langdeau,* 371 U.S. 555 (1963); *Michigan National Bank* v. *Robertson,* 372 U.S. 591 (1963). In *Mercantile National Bank* the plaintiff sued two national banks, among others, in a county other than that in which they were located. The banks' motion to dismiss the action for improper venue prompted this Court to construe section 94 as follows:

> "The phrase 'suits . . . may be had' was, in every respect, appropriate language for the purpose of specifying the precise courts in which Congress consented to have national banks subject to suit and we believe Congress intended that in those courts alone could a national bank be sued against its will." *Mercantile National Bank, supra* at 560.

The fact that the instant action was brought in the federal courts, not in state courts as in *Mercantile National Bank,* and that it purports to be brought pursuant to the Exchange Act does not make section 94 any less mandatory as to where suit must be brought.*

* This Court, in *Mercantile National Bank,* did not have occasion to pass upon the issue of whether section 94 should be given a similar mandatory reading in an action in a federal court. But, Judge Friendly in *Bruns, Nordeman & Co.* v. *American Nat'l Bank & Trust Co.,* 394 F.2d 300, 303 (2d Cir.), *cert. denied,* 393 U.S. 855 (1968), observed: ". . . it would indeed strain language to say that the same verbs were merely permissive with respect to suits in federal courts although prohibitory as to actions in state ones."

Two United States Courts of Appeals have rejected, unanimously in each case, petitioner's argument of "implied repeal" of section 94. The Courts of Appeals for the Second and Ninth Circuits have concluded that Congress did not, by the broad and general venue language of the Exchange Act, amend, repeal or supersede the clear and explicit command of section 94. *Klein* v. *Bower,* 421 F.2d 338 (2d Cir. 1970); *Bruns, Nordeman & Co.* v. *American National Bank & Trust Co.,* 394 F.2d 300 (2d Cir.), *cert. denied,* 393 U.S. 855 (1968); *First National Bank of Boston* v. *United States District Court,* 468 F.2d 180 (9th Cir. 1972); and *United States National Bank* v. *Hill,* 434 F.2d 1019 (9th Cir. 1970).

The United States Court of Appeals for the Third Circuit has reached a contrary result. *Ronson Corp.* v. *Liquifin Aktiengesellschaft,* 483 F.2d 852 (3d Cir. 1973).* It is submitted that *Ronson* and the District Court opinion in *Levin* v. *Great Western Sugar Co.,* 274 F. Supp. 974 (D. N.J. 1967)* upon which *Ronson* was premised and *Carpenter* v. *Hall,* 352 F. Supp. 806 (S.D. Texas 1972) are contrary to the overwhelming weight of precedent and erroneous in their reasoning.** Accordingly, the rationale of *Ronson* should be rejected by this Court.

* Although no Court of Appeals has considered the holding of *Ronson* since its issuance, two District Courts have specifically refused to follow its holding: *Odette* v. *Shearson, Hammill & Co.,* 394 F. Supp. 946, 950 (S.D.N.Y. 1975) and *McClung* v. *La Salle Nat'l Bank of Chicago, Ill.,* 387 F. Supp. 977, 979 (S.D. Iowa 1975).

Moreover, we have been unable to find any opinion issued by any District Court subsequent to the *Ronson* decision which has followed *Ronson's* reasoning.

The majority of the District Courts that earlier had considered the issue rejected the contention that the venue provisions of section 94 have been impliedly repealed or amended by those of the Exchange Act: *Allied Steel & Tractor Products, Inc.* v. *First Nat'l City Bank of New York,* 54 F.R.D. 256, 259 (N.D. Ohio 1971); *Swiss Israel Trade Bank* v. *Mobley,* 319 F. Supp. 374, 375 (S.D. Ga. 1970); *Rome* v. *Eltra Corp.,* 297 F. Supp. 314, 318 (E.D. Pa. 1969); *General Elec. Credit Corp.* v. *James Talcott, Inc.,* 271 F. Supp. 699, 706 (S.D.N.Y. 1966); *cf. Aloha Airlines, Inc.* v. *Hawaiian Airlines, Inc.,* 58 F.R.D. 429, 431 (D. Hawaii 1973). Only *Levin* v. *Great Western Sugar Co.,* 274 F. Supp. 974 (D.N.J. 1967) and *Carpenter* v. *Hall,* 352 F. Supp. 806 (S.D. Texas 1972) are to the contrary.

POINT II

Section 94 of the National Bank Act has not impliedly been repealed by the venue provisions of Section 27 of the Exchange Act.

Petitioner and the Commission argue that the decisions of the Second and Ninth Circuits fail to recognize that the venue provisions of the Exchange Act impliedly have repealed section 94 of the National Bank Act. However, "the cardinal rule is that repeals by implication are not favored." *Posadas* v. *National City Bank,* 296 U.S. 497, 503 (1936); *see Morton* v. *Mancari,* 417 U.S. 535, 549 (1975); *Jones* v. *Mayer Co.,* 392 U.S. 409 (1968). In order to establish that section 27 of the Exchange Act impliedly repealed section 94, petitioner must demonstrate that: (*i*) the intention of Congress to repeal the earlier statute is clear and manifest and (*ii*) there is a positive repugnancy between the two statutes. Petitioner bears the burden of persua-

* The District Court in *Levin* acknowledged that its conclusion of "implied repeal" was predicated on "a quick examination of the 1933 and 1934 Securities Acts." *Id.,* at 978.

** Petitioner's reliance on *Carpenter* v. *Hall, supra,* and his implied suggestion (Br. 19) that the Fifth Circuit would not follow the decision of the Second Circuit in *Bruns, Nordeman & Co., supra,* is misplaced given the later decision of the Fifth Circuit in *Northside Iron and Metal Co.* v. *Dobson and Johnson, Inc.,* 480 F.2d 798 (5th Cir. 1973). In that case it was squarely held that section 94 was mandatory in its application. It must be assumed that in making its decision the Fifth Circuit was well aware of the decision in *Carpenter* v. *Hall.*

sion on each of these issues. *Amell* v. *United States,* 384 U.S. 158, 165-166 (1968); *Bulova Watch Co.* v. *United States,* 365 U.S. 753, 758 (1961); *Fourco Glass Co.* v. *Transmirra Products Corp.,* 353 U.S. 222, 228-229 (1957).

In the leading case *United States* v. *Borden Co.,* 308 U.S. 188, 198-99 (1939), the Court stated:

> "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. [citation omitted.] *The intention of the legislature to repeal 'must be clear and manifest'* [citations omitted]. It is not sufficient . . . 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary'. There must be '*a positive repugnancy* between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy.' " (italics added.)

This view has been expressed by this Court in many ways, at many times and in the strongest possible terms. ". . . [T]he intention of the legislature to repeal must be clear and manifest" *Red Rock* v. *Henry,* 106 U.S. 596, 602 (1882); there can be no such repeal unless the implication is "irresistible" *Ex Parte United States,* 226 U.S. 420, 424 (1913); or unless the alleged repealing statute is "so clearly repugnant as to imply a negative" *Beals* v. *Hale,* 45 U.S. (4 How.) 13, 17 (1845).*

* It is the "duty" of the Court "to give effect to both the old and new statute, if that can be done consistently with the words employed by Congress in each." *United States* v. *Healey,* 160 U.S. 136, 146 (1895). A later enactment is not to be construed as impliedly repealing a prior law "unless no other reasonable construction can be

(footnote continued on next page)

With respect to the Exchange Act specifically, "[r]epeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 (1963).

A. Petitioner Has Failed to Show Any Congressional Intent to Repeal Section 94 of the National Bank Act.

Petitioner has not and indeed cannot offer any evidence of intent, either express or implied, on the part of Congress to repeal section 94 of the National Bank Act. This Court recently considered an argument for repeal by implication in *Blanchette* v. *Connecticut General Insurance Corporations* ("Regional Rail Reorganization Act Cases"), 419 U.S. 102 (1974). In quoting from the Special Court's opinion, this Court noted:

> " 'Presumably Congress had given serious thought to the earlier statute .... Before holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the *legislature's using language showing that it has made a considered determination* to that end . . . .' " *Id.,* at 134 (italics added).

applied." *United States* v. *Jackson,* 302 U.S. 628, 631 (1938). To find a repeal, it must be "impossible" for both provisions under consideration to stand. *Wilmot* v. *Mudge,* 103 U.S. 217, 221 (1880). Repeals by implication "are never admitted where the former can stand with the new act." *Chew Heong* v. *United States,* 112 U.S. 536, 549 (1884). "If, by any reasonable construction, the two statutes can stand together, they must so stand." *State* v. *Stoll,* 84 U.S. (17 Wall.) 425, 431 (1873). The proper approach is to "reconcile" the operation of the two statutory schemes. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware,* 414 U.S. 117, 127 (1973).

The Southern District of New York in *General Electric Credit Corp.* v. *James Talcott, Inc.*, 271 F. Supp. 699, 706 (S.D.N.Y. 1966) concluded that:

> "Neither the briefs of counsel nor independent research by the Court has uncovered evidence that the venue provisions of the Securities and Exchange Acts were intended to supplant the special venue provisions of the National Bank Act—the intention of the Legislature to repeal is not only not clear and manifest, *it is non-existent so far as the evidence is concerned.*" (italics added.)*

Respondent has canvassed the Congressional Committee Reports in both Houses of Congress and the Congressional debates on the Exchange Act. Respondent has not found, and petitioner has not presented to this Court, any evidence of the "considered determination" of the Congressional intent to repeal as prescribed by this Court in *Blanchette, supra.*

Petitioner contends "that Congress' silence evidences its intent, in 1934, to impose the venue provisions of the 1934 Act on all involved without excepting Banks". (Br. 16). This Congressional silence, however, falls woefully short of the clearly expressed Congressional intent which this Court has repeatedly and emphatically required to

* This quoted conclusion from *General Elec. Credit Corp.* warrants careful consideration. There, in addtion to the efforts of the Court and of counsel for the parties, the Commission (arguing for implied repeal) and the Department of Justice on behalf of the Comptroller of the Currency (arguing against implied repeal), as *amici curiae*, briefed the question of venue. None of these briefs presented the slightest evidence to the *General Elec. Credit Corp.* court of a Congressional intention, in enacting section 27 of the Exchange Act in 1934, to repeal the provisions of section 94 of the National Bank Act.

effectuate a repeal by implication.* *See Federal Aviation Administration* v. *Robertson*, 422 U.S. 255, 266 (1975); *Morton* v. *Mancari, supra* at 551; *United States* v. *Borden Co., supra* at 198-199.

In effect, petitioner seeks to turn this Court's long-standing canon of construction upside down and require Congress to state expressly that it is *not* repealing an earlier statute. The correct rule is exactly the converse. In the absence of express repeal or a showing of clear and manifest intent to repeal, the presumption is that Congress intends no repeal. *Blanchette* v. *Connecticut General Insurance Corporation, supra* at 133-134.

Petitioner further argues that a Congressional intent to repeal section 94 can be inferred from the fact that certain other provisions of the Securities Act of 1933 and the Exchange Act contain explicit exemptions for national banks. *See* 15 U.S.C. §77c(a)(2) (exemption of securities issued or guaranteed by any bank); 15 U.S.C. §77l(2) (exemption from civil liabilities of securities issued or guaranteed by any bank); and 15 U.S.C. §78l(i) (administration and enforcement of certain registration and proxy provisions with respect to securities issued by national banks is vested in the Comptroller of the Currency). Petitioner urges that if Congress had intended national

* In its brief the Commission (Br. 19) refers to Senator Duncan U. Fletcher's report concerning Stock Exchange Practices (Sen. Comm. on Banking and Currency, S. Rep. No. 1455, 73d Cong., 2d Sess., 1934) as evidencing a determination by Congress to include national banks within the purview of the Exchange Act. This report, however, was submitted to Congress *subsequent* to the passage of the Securities Act of 1933 and the Exchange Act. The report surveyed the abuses that led to the passage of those acts, and considered problems with respect to stock exchange practices which might merit further consideration. It did not propose or suggest any new specific legislation.

banks to be exempted from the venue provisions of the Exchange Act, it would have expressly so stated. This argument says too much—it overlooks the fact that there was no need to incorporate a special exemption in the venue provisions of the Exchange Act. Congress by enacting section 94 had already provided specifically for venue in suits against national banks, and had Congress intended to change those venue provisions it would have said so. Congress must be presumed in 1934 to have had knowledge of this existing exemption.* *Erlenbaugh* v. *United States,* 409 U.S. 239, 244 (1972). *See* 1A Sutherland, *Statutes and Statutory Construction,* §23.10 (4th ed., C. Sands 1972).

In *General Electric Credit Corp.* the district court said:

> "Had it been the intention of Congress to exempt national banks from the special venue provisions of the National Bank Act, it is reasonable to assume that they would explicitly have so provided. 'The presence of explicit exemptions in certain parts of a statute should make us hesitate to find a congressional intention to create implicit exemptions elsewhere in the same legislation'. (citation omitted.)" 271 F.Supp. at 707.

This analysis is clearly correct. However, the Court in *Ronson* concluded differently. The most that petitioner can draw from the *Ronson* decision is that one court, in a conclusory *per curiam* opinion, has seen fit to reach an opposite decision. This hardly supports a "clear and manifest" Congressional intention to repeal by implication section 94 of the National Bank Act. *United States* v. *Borden Co., supra* at 198-199.

* Petitioner finds himself compelled to admit that ". . . when Congress enacted the 1934 Act it is presumed to have been fully aware of the National Bank Act (Br. 28)."

The provisions of the Exchange Act must be viewed in the context of other legislation enacted in the early 1930's. In 1933 with the passage of the Glass-Steagall Act, 12 U.S.C. §321, Congress specifically and comprehensively considered the relationship between banks and the securities industry, and limited the role of commercial banks with respect to securities transactions. Thus, by 1934 when the Exchange Act was enacted, Congress had legislated with great particularity concerning the role of banks in securities transactions. This is evidenced by the fact that the Exchange Act contains exemptive provisions for banks. When the provisions of the Exchange Act are viewed in the context of the Glass-Steagall Act, it is patent that the Exchange Act was not intended to preempt or to intrude upon other federal legislation affecting national banks.

B. Petitioner Has Failed to Demonstrate Positive Repugnance or Irreconcilable Conflict Between Section 94 of the National Bank Act and Section 27 of the Exchange Act.

Not only has petitioner failed to show a clear intent to repeal,* but he has also failed to carry the other half of his burden—to show positive repugnance or irreconcilable conflict between section 94 and the provisions of section 27 of the Exchange Act. This repugnance or conflict must be demonstrated because if the two venue provisions are "capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari, supra* at

* Apparently recognizing the impossibility of establishing an implied repeal of section 94, petitioner argues that "It is not even necessary to find an implied repeal here" (Br. 20), claiming that the two venue provisions are " 'supplementary' and that each may be made 'fully effective within their (*sic*) sphere' " (Br. 21).

551. Petitioner appears either to concede there is no repugnancy between the two statutes or to assume repugnancy; nowhere does he show in what manner the two statutes are in fact repugnant.

The applicable rule is that the provisions of one statute, specifically focusing on a particular matter, will always, in the absence of express contrary legislative intent (of which there is none here), be held to prevail over provisions of a different and later statute more general in its coverage.* *Morton* v. *Mancari, supra* at 550-551; *Bulova Watch Co.* v. *United States,* 365 U.S. 753, 758 (1961); *Washington* v. *Miller,* 235 U.S. 422, 428 (1914); *Rodgers* v. *United States,* 185 U.S. 83, 87-89 (1902).

This Court stated in *Ex Parte Crow Dog,* 109 U.S. 556, 570 (1883):

> "The rule is, *generalia specialibus non derogant.* . . . 'And the reason [for this rule] is,' said Wood, V. C., in *Fitzgerald* v. *Champenys,* 30 L.J. N.S. Eq. 782; 2 Johns. and Hem. 31-54, 'that the legislature . . . *having observed all the circumstances of the case and provided for them,* does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.'" (italics added.)

Congress specifically considered the circumstances relating to national banks and accorded them special status

* Cases cited by the Commission such as *Elof Hansson, Inc.* v. *United States,* 178 F. Supp. 922 (Cust. Ct. 1959), rev'd on other grounds, 296 F.2d 779 (C.C.P.A. 1960), *cert. denied,* 368 U.S. 899 (1961) and *Marcello* v. *Ahrens,* 212 F.2d 830 (5th Cir. 1954), *aff'd sub nom. Marcello* v. *Bonds,* 349 U.S. 302 (1955), are clearly distinguishable. In each of those cases the legislative history contained clear evidence as to the intent of Congress.

when it enacted section 94. As this Court stated in *Cook County National Bank* v. *United States,* 107 U.S. 445, 448 (1882): "We consider [the National Bank] Act as constituting by itself a complete system for the establishment and government of national banks. . . ." In contrast to the highly particularized venue provisions of section 94, the broad venue provisions of the Exchange Act apply to all persons. Although the venue provisions of the Exchange Act may be considered "special" in relation to the general venue provisions contained in 28 U.S.C. §1391, they are clearly *general* venue provisions for the broad spectrum of actions which can be instituted under the Exchange Act. By contrast, section 94 focuses specially on one single, narrow, determinate class. Indeed, with the exception of the provision making venue proper in the district where the violation occurred, the language of the venue provisions of the Exchange Act is similar to that employed in 28 U.S.C. §1391.* And it has been expressly held that section 1391 did not impliedly repeal section 94. *Buffum* v. *Chase National Bank,* 192 F.2d 58 (7th Cir. 1951), *cert. denied,* 342 U.S. 944 (1952); *International Refugee Organization* v. *Bank of America,* 86 F. Supp. 884 (S.D.N.Y. 1949).

Petitioner also argues that there is a positive repugnancy between the two enactments merely because if section 94 prevails the Bank can be sued only in Boston, but if the venue provisions of the Exchange Act apply then suit in New York is permissible. This truism is applicable in every case where implied repeal is urged: the *result*

* 28 U.S.C. §1391(c) provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

reached in a particular action will always differ if it is assumed that the latter statute has repealed the earlier one.

Furthermore, the statutes are not in irreconcilable conflict; they can co-exist. The bank can be sued in Massachusetts. Section 94 simply stands, as it always has, as an exception granted by Congress to national banking associations in order to further the aims for which they are established. Effect can be given to the venue provisions of both the National Bank Act and the Exchange Act.

The very fact that section 94 is mandatory, whereas the venue provisions of the Exchange Act are permissive, is itself sufficient to establish that there is no irreconcilable conflict between the two statutes. A plaintiff's choice of venue under the Exchange Act is not absolute in any event; his action may be transferred under 28 U.S.C. §1404(a), notwithstanding that venue may be proper in the particular jurisdiction in which the action is instituted.*

On the other hand, section 94 commands that venue in an action against a national bank be laid in the district where the bank is established and that, upon the bank's objection, an action brought elsewhere shall be transferred to that district or dismissed as to the bank. Just as plaintiff's initial choice of venue in any securities litigation must give way, under section 1404(a), where the interests of justice and the convenience of witnesses so require, so must a plaintiff's choice of venue give way where a national bank is involved.

* 28 U.S.C. §1404(a) provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

POINT III

The alleged policy considerations urged by petitioner to support his argument of implied repeal provide no basis for ignoring the plain mandate of Congress.

The alleged policy arguments which petitioner and the Commission advance are inapplicable and unpersuasive. Essentially two points are attempted to be made: First, section 94 was enacted in 1863 and national banks no longer need or deserve the protection of section 94; and second, petitioner will be inconvenienced if required to pursue his purported cause of action against the Bank of Boston.*

The fact that a statute has been on the books for more than a hundred years, and that a litigant may suffer some slight inconvenience through its application does not provide an acceptable basis for this Court to repeal an act of Congress. At least two independent lines of authority demonstrate that Congressional policy with respect to national banking associations remains vital and fully applicable today.

First, this Court's decisions in *Michigan National Bank* and *Mercantile National Bank,* make abundantly clear that section 94 is anything but an anachronism. All the arguments petitioner advances with respect to the age of section 94, its alleged "xenophobic" character, the changed circumstances since its enactment, and the alleged lack of

* We note in passing that it appears that the arguments set forth on pages 23-25 of the petitioner's brief are taken almost verbatim from the arguments of the plaintiff in *McClung* v. *La Salle Nat'l Bank, supra,* and were summarily rejected by the District Court in that case.

need of national banks for the protection of section 94, were as much or more applicable in those cases.

In *Michigan National Bank* this Court reaffirmed its holding that section 94 is mandatory in factual circumstances far more deserving of sympathy than those presented here. In that case the plaintiffs were residents of Nebraska who had purchased housetrailers in Nebraska and executed notes and lien instruments to a local dealer in Nebraska who in turn sold them to a national bank in Michigan. The Court adhered to its ruling in *Mercantile National Bank* and held that the national bank could only be sued in Michigan, where it was established, even though the bank was doing business in Nebraska and had allegedly violated the Nebraska Installment Loan Act.

This Court has ruled expressly on the weight to be accorded speculations concerning the alleged lack of present day relevance of the policy behind the enactment of section 94. In *Mercantile National Bank,* the Court quoted with approval its earlier statement in *First National Bank of Charlotte* v. *Morgan,* 132 U.S. 141 (1889) concerning the policy underlying the venue provisions of the National Bank Act, and stated that:

> "... without indulging in conjecture as to the object of the exemption in question, it is sufficient that it was granted by Congress. . . ." 371 U.S. 561-562, n. 12.

Significantly, this Court, as did Judge Friendly in *Bruns, Nordeman & Co., supra* at 304, has given clear invitations to Congress to amend section 94, if it disagreed with the Court's interpretation of the scope of that section. To date Congress has not accepted these invitations. Such

silence can only be construed as evidence of an intention on the part of Congress to leave undisturbed the existing construction of the venue provisions of the National Bank Act. *Canada Packers, Ltd.* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 385 U.S. 182 (1966).

Second, rather than acting to amend section 94, Congress at dates far more recent than 1863 has manifested clearly its intent that national banks shall continue to be considered separately for venue purposes. The court in *Buffum* noted that Congress, in codifying the law in 1948:

> "... repealed only all laws specified in the revision and other superseded and obsolete provisions relating to the courts. It attached a schedule of the laws which it intended to repeal. The House reported that this list had been carefully checked and rechecked many times. Section 94 was not amongst the list of repealed laws." 192 F.2d at 61.

This Congressional recodification of the prior law is further evidence that Congress has, subsequent to the passage of the Exchange Act, addressed itself to the question of the forums in which national banks can and cannot be sued. Thus, the choice to retain section 94 was clearly deliberate.*

In 1957, the Senate passed a bill (S. 1451), entitled the Financial Institutions Act of 1957, the purpose of which was to ". . . remove obsolete provisions from the [banking]

* Congress also codified in 1948, in section 1394 of Title 28 U.S.C., a further venue provision applicable solely to national banks. That section provides:

> "Any civil action by a national banking association to enjoin the Comptroller of the Currency, under the provisions of any Act of Congress relating to such associations, may be prosecuted in the judicial district where such association is located."

statutes, and . . . to add new authority where needed to meet modern conditions." 105 Cong. Rec. 3475 (1959) (remarks of Senator Robertson). Although this bill never reached the floor of the House of Representatives, the version passed by the Senate reenacted section 94 with only technical changes. The Senate by passage of the Financial Institutions Act of 1957 specifically considered and reviewed section 94, and gave no indication that that section was anything but fully effective and vital.

The vitality of section 94 is additionally evidenced by the fact that in 1959, Congress passed twenty-five amendments to the National Bank Act to "clarify or eliminate ambiguities . . . [and] to repeal certain laws which have become obsolete." (2 U.S. Code, Cong. & Admin. News at 2232 (1959).) Once again, despite the passage of such legislation affecting national banks, Congress did not see fit to amend, repeal or modify the venue provisions of section 94.

Any argument that Congress has not paid careful and continuing attention to the specific needs of national banks in the context of other national legislation is contradicted by Congressional history. As this Court recognized in *First Agricultural National Bank of Berkshire County* v. *State Tax Commission,* 392 U.S. 339 (1968):

> "... Congress has been far from reluctant to pass legislation in the banking field. There are important committees on banking and currency in both Houses which continually monitor banking affairs and propose new legislation when changes are felt to be needed." *Id.,* at 341.

* * *

> "Now this Court is asked to change what legislative history and prior decisions have established is the precise meaning of an Act of Congress. This we cannot do. For, as we pointed out above, the banking field has traditionally been an area of particular congressional concern marked by legislation responsive to new problems." *Id.,* at 345.

Petitioner also asserts that the policy reasons underlying the Exchange Act are of such all-pervasive importance that they must necessarily override any other statutory provision.* In *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963) this Court specifically held that the Exchange Act was not such a broad or pervasive regulatory scheme as to constitute an implied repeal of the antitrust laws insofar as they exempted the New York Stock Exchange from its strictures. Indeed, the Court stated:

> "Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and then only to the minimum extent necessary." 373 U.S. at 357.**

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* In support of his conclusion that section 27 of the Exchange Act must prevail over section 94, petitioner makes the bootstrap argument that in 1934 "it seems clear that Congress was consumer concerned and its 1934 Act *was* clearly meant to supersede any earlier conflicting statute" (Br. 12).

** Petitioner's reliance on *Gordon* v. *New York Stock Exchange, Inc.,* 422 U.S. 659 (1975) and *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694 (1975) is misplaced. In those cases this Court found that the Exchange Act impliedly repealed the operation of certain provisions of the antitrust laws. To have found that the antitrust laws were applicable would have crippled the entire regulatory framework established by the Exchange Act. In the case at bar, the Court is not faced with a similar problem. Inconvenience to a particular litigant hardly meets the test of a serious frustration of the basic aims of the Exchange Act which was the standard employed in *Silver, supra, Merrill Lynch, supra, Gordon, supra* and *National Association of Securities Dealers, supra.*

There is nothing in the facts of the case at bar that precludes the Exchange Act from "working". The sole issue is in what forum that "work" will be effected. We submit that application of the Exchange Act venue provisions, in contravention of the clear mandate of the National Bank Act, is not necessary "to make the Securities Exchange Act work". If the Exchange Act did not impliedly repeal the antitrust laws in an area so vital and central to the regulatory scheme prescribed by the Exchange Act, how then can it be persuasively argued that the venue provisions of the Exchange Act, which are decidedly peripheral to the main purpose of that Act, can be held to have impliedly repealed the venue provisions of the National Bank Act? The Bank is not immune from the substantive provisions of the Exchange Act. Petitioner clearly is able to assert his claims against the Bank for alleged securities violations in the District of Massachusetts, and thereby seek to effectuate what he conceives to be the purpose of the Exchange Act.

Petitioner's and the Commission's views with respect to policy or the social utility of a legislative enactment may be interesting and informative but they are quite beside the point, particularly when the challenged enactment is the product of a considered and comprehensive legislative determination which retains its vitality.

It is undebatable that the venue provisions of the National Bank Act avoid burdens on national banks and serve other significant functions. The National Bank Act provides that bank examiners "shall examine every national bank twice in each calendar year . . . [and] such examinations [are] to be made more frequently if consid-

ered necessary", 12 U.S.C. §481 (Supp. 1975) (see also Regulations of the Comptroller of the Currency, 12 C.F.R. §4.11). These examinations, designed to prevent alteration or removal of records, and usually made without prior notice, have been determined by the Comptroller to be the most effective way of carrying out his duties under the National Bank Act. To allow suits to be brought against national banks far from the district where they are established and requiring the production of original records and key executives as witnesses in a distant district may well hamper the Comptroller in fulfilling his important supervisory function. To subject a national bank and its key executive officers to suits in districts far from those in which it is established would severely interfere and disrupt the operations and business of that bank.

The Commission's contention that section 94 must be repealed by this Court because it could "have an adverse effect upon the Commission's enforcement activities" (Commission Br. 5) is nothing but gross speculation. As the court in *General Electric Credit Corp., supra,* noted in response to a similar argument "[c]learly both acts can exist together and their co-existence for over thirty years does not appear to have impeded in any way the enforcement of the Securities Exchange Act." 271 F. Supp. at 708. Interestingly, the Commission has not cited one instance in which it has been unable to join a national bank as a party in an enforceemnt action. Moreover, this precise objection was raised in *Mercantile National Bank, supra* at 563, and rejected by this Court with the terse observation that the supposed inconvenience "is a matter for Congress to consider".

In reality, petitioner's chief argument is one of inconvenience to himself as a litigant if compelled to sue the

Bank in Boston.* The desirability of obviating a multiplicity of suits is a consideration which antedates the provisions of the Exchange Act, and is a problem that exists wholly apart from that Act. Section 94 represents a choice by Congress that, as between the inconvenience to a plaintiff's being required to sue a national bank in the district where the latter is established, and the inconvenience to the bank in requiring it to defend itself in a district of plaintiff's choice, the convenience of the bank shall control.

In *Mercantile National Bank,* 371 U.S. at 563-564, this Court expressly rejected an argument based on the desirability of avoiding a multiplicity of suits, stating:

> "Similarly, even if all of the 145 defendants may not be sued in one proceeding in Dallas County with the same facility as they may in Travis County, this, of course, is insufficient basis for departing from the command of the federal statute."

In making a national bank amenable to suit in either federal or state courts, Congress determined, and it has repeatedly confirmed the determination, that such actions must be brought in the district in which the bank is established. This Court, as it has done in the past, should give

* Petitioner also seems to argue that section 94 violates the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution. That argument was specifically rejected in *Northside Iron,* 480 F.2d 798, 800 (5th Cir. 1973):

> "While the statute does confer a special benefit on national banks, we cannot agree that it lacks a rational basis . . . . 'Unquestionably Congress had authority to prescribe the manner and circumstances under which the banks could sue or be sued in the courts.' *Mercantile National Bank* v. *Langdeau, supra,* 371 U.S. at 558. . . ."

full effect to that policy determination. Although commentators, including Judge Friendly and the American Law Institute, have been critical of section 94, it has not been suggested by them that this Court should cure perceived deficiencies in section 94.* Rather, it has been recognized that the Congress, and it alone, has the power to eliminate these deficiencies by amendment, repeal or modification of section 94.

As was stated in *Northside Iron,* 480 F.2d 798, 800 (5th Cir. 1973):

> "The historical purpose of the bank venue statute was to protect national banks against inconvenience and disruption in the conduct of their business which might result from removal of records to a foreign district for purposes of defending a lawsuit. *First National Bank* v. *Morgan, supra,* 132 U.S. at 145, 10 S. Ct. at 38. While it is undoubtedly true, as appellants pointed out, that technological advances in transportation and communication in the past century have reduced the potential hardship to a bank of defending a lawsuit in a foreign district, *we cannot say that such distant litigation would not normally entail some inconvenience for the bank and disruption of its business,* or that the special treatment accorded national banks has no rational basis. *If the venue statute is to be amended or repealed, Congress is the body which must act to do so and the body to which appellants' argument should be addressed."* (italics added.)

* Moreover, this Court, to correct alleged deficiencies in section 94, would not have to find that section 27 partially repeals section 94. It is possible, in a proper case, by application of the doctrine of waiver to obviate the restrictive nature of section 94. Also, in certain situations, a proper interpretation of the local action exception to section 94, first enunciated in *Casey* v. *Adams,* 102 U.S. 66 (1880), may accomplish a similar result.

There are 4,708 national banks located in all parts of the United States. Annual Report of the Comptroller of the Currency—1974. It has long been recognized that national banks are unique entities charged with duties to the public, and they operate as fiscal agents of the federal government, notwithstanding that they are the subject of private ownership. *Easton* v. *Iowa*, 188 U.S. 220, 221 (1903). Individually these national banks vary in their size and in the scope of their activities—some are extremely small and local, and others are large and engage in a variety of services. Any change in the National Bank Act is a matter of national importance. As this Court said in *Mercantile National Bank, supra* at 558-559:

> "National banks are federal instrumentalities and the power of Congress over them is extensive .... Unquestionably Congress had authority to prescribe the manner and circumstances under which the banks could sue or be sued in the courts and it addressed itself to this matter in the 1863 Act."

In order properly to consider any legislation that would affect these banks, Congress would be required to hold hearings and engage in extensive study.

Any finding of an implied repeal of section 94 would amount to piecemeal judicial legislation by this Court. The only issue presented by petitioner concerns the venue provisions of the Exchange Act and those of the National Bank Act. But, other important federal statutes implementing basic national policies should also be considered in any amendment or revision of section 94. For example, the antitrust laws and the Consumer Credit Protection Act, each enacted subsequent to the National Bank Act, contain broad venue provisions similar to those found in the Exchange Act. *See*, 15 U.S.C. §§15 and 22 and 15 U.S.C. §1640 (e) (1970). This Court recently observed that it does not sit as a "legislative committee of revision". *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351, 356 (1971), and it should not do so here.

POINT IV

No waiver of the venue provisions of section 94 of the National Bank Act has occurred.

In the end as in the beginning of this proceeding petitioner can only assert that the Bank waived the venue provisions of section 94. A national bank may waive the provisions of section 94, either by an express waiver or by a failure to assert the privilege when such a bank is sued outside the district in which it is established. *See Michigan National Bank, supra; First National Bank of Charlotte, supra.* The qualification by the Bank to perform limited fiduciary duties in New York in connection with trusts and estates pursuant to section 131(3) of the New York Banking Law is not a waiver of the venue provisions of section 94 of the National Bank Act and a consent by the Bank to suit in New York State for alleged violation of the Exchange Act.

Petitioner claimed in the District Court and the Court of Appeals, and now again asserts, that the Bank expressly waived its right to be sued only in the District of Massachusetts because the power of attorney filed by the Bank did not track precisely the language contained in section

131(3) of the New York Banking Law.* This argument was rejected below and it must fail here. No requisite intent to waive this venue right can be implied from the language contained in the Power of Attorney filed by the Bank. The Bank has not voluntarily and intentionally relinquished its right to be sued in the District of Massachusetts, except as to those activities which are within the scope of section 131(3).

In *Buffum* v. *Chase National Bank, supra,* the United States Court of Appeals for the Seventh Circuit when confronted with an almost identical situation as in the instant action, declared explicitly:

> "Waiver is a voluntary and intentional relinquishment or abandonment of a known existing right or privilege, which, except for such waiver, would have been enjoyed. [citation omitted] It may be expressed formally or it may be implied as a necessary consequence of the waiver's conduct inconsistent with an assertion of retention of the right. It [the waiver] must be proved by the party relying upon it. *And if the only proof of intention to waive rests on what a party does or forbears to do, his act or omissions to act should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible.*" 192 F.2d at 60-61. (italics added).

See Northeast Iron & Metal Co. v. *Dobson & Johnson, Inc., supra.*

---

* As required by section 131(3), the Bank filed with the Superintendent of Banks for the Sate of New York a power of attorney which designated the Superintendent of Banks as the Bank's agent in New York upon whom process could be served in any action affecting or relating to an estate, trust or fund held by the Bank or represented by it. As expressly provided by section 131(3), this designation permitted the Bank to engage only in certain limited and specified fiduciary activities.

In order to constitute a waiver of the venue provisions of section 94, the declaration or conduct relied upon must demonstrate a voluntary and intentional relinquishment of the privilege. Here, however, as found by District Court Judge MacMahon, the fact that the power of attorney may be "broad" does not negate an intent to comply only with the provisions of section 131(3). (A. 90a) The power of attorney, as filed by the Bank, is not ". . . manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right . . . ." The power of attorney was filed in compliance with section 131(3) and is consistent only with an intent to qualify to conduct limited fiduciary activities in New York. The scope of the power of attorney and the effect of filing it are clear and unmistakable.

Conclusion

The petition for a writ of certiorari should be dismissed as improvidently granted. In the alternative, the judgment of the United States Court of Appeals for the Second Circuit affirming the dismissal of the complaint in this action with respect to The First National Bank of Boston should be affirmed.

Respectfully submitted,

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January 2, 1976

APPENDIX

New York Banking Law section 131(3) provides:

3. Except as otherwise provided in article five of this chapter,[3] no corporation other than a trust company shall have or exercise in this state the power of receiving deposits of money, securities or other personal property from any person or corporation in trust, or have or exercise in this state any of the powers specified in section one hundred of this article, or have or maintain an office in this state for the transaction of, or transact, directly or indirectly, any such or similar business, except that a federal reserve bank may exercise the powers conferred by subdivision one of such section if authorized so to do by the laws of the United States and any domestic corporation legally exercising any of the powers conferred by such subdivision at the time this act takes effect may continue to exercise such powers, and a foreign banking corporation or trust company incorporated under the laws of another state, which by the law of the state of its incorporation may act as trustee, guardian, executor, administrator, or in any other fiduciary capacity under any last will and testament or codicil thereto or other testamentary writing or under any deed of trust inter vivos or other written instrument establishing a trust, or by the appointment of any court of said state, may act in this state in any such fiduciary capacity, provided similar domestic corporations which have the power under the law of this state to act herein in any such fiduciary capacity, are permitted to act in like fiduciary capacity in the state where such foreign corporation has its domicile, provided that if such foreign corporation proposes to act in any fiduciary capacity in this state and to do so is required to file its qualification in the surrogate's court of this state, it shall file in the office of the clerk of the surrogate's court

3. Section 20 *et seq.*

of the county in which application for such appointment is pending (a) a duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing such clerk and his successors its true and lawful attorney, upon whom all process in any action or proceeding against such fiduciary, affecting or relating to the estate, trust or fund represented or held by such fiduciary or the acts or defaults of such corporation in reference to such estate, trust or fund may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state, and (b) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office; provided further that if such foreign corporation proposes to act in any other fiduciary capacity in the state, it shall file in the office of the superintendent (a) a duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing the superintendent and his successors its true and lawful attorney, upon whom all process in any action or proceeding against [such fiduciary affecting or relating to the estate, trust or fund held or represented by such fiduciary or the acts or defaults of such corporation in reference to such estate, trust or fund] may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state, (b) a written certificate of designation, which may be changed from time to time thereafter by the filing of a new certificate of designation, specifying the name and address of the officer, agent, or other person to whom such process shall be forwarded by the superintendent, and (c) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office.

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-268

HYMAN RADZANOWER,

Petitioner,

vs.

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W.J. BRESNAN, H.J. SCHAFLY, LEONARD TOW, R.C. TODD, JR., B.P. SIMON, J.B. GREEN, L.H. READ, R.G. WILSON, H.E. FLAHERTY, B.D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R.F. LEWIS, P.L. LOWE, CHARLES LUCKMAN, M.B. MITCHELL, A.E. PUCKETT, J.H. RICHARDSON, M.E. LIVINGSTON, JACK WRATHER, FIRST NATIONAL BANK OF BOSTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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IN THE
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HYMAN RADZANOWER,
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TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W.J. BRESNAN, H.J. SCHAFLY, LEONARD TOW, R.C. TODD, JR., B.P. SIMON, J.B. GREEN, L.H. READ, R.G. WILSON, H.E. FLAHERTY, B.D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R.F. LEWIS, P.L. LOWE, CHARLES LUCKMAN, M.B. MITCHELL, A.E. PUCKETT, J.H. RICHARDSON, M.E. LIVINGSTON, JACK WRATHER, FIRST NATIONAL BANK OF BOSTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Petitioner's Reply Brief

QUESTIONS PRESENTED

(1) In a securities violation case, may the more liberal venue provisions of the Securities and Exchange Act of 1934 co-exist with the more restrictive venue provisions of the National Bank Act of 1864 or does the Securities and Exchange Act prevail?

(2) Whether the First National Bank of Boston waived the venue provisions of Section 94 of the National Bank Act?

Contrary to the directions in the brief of First National Bank of Boston ("Boston Bank"), the first question does not take us exclusively onto the path toward the doctrine of implied repeal. This reply brief will deal only with the first question presented.

POINT I

THE ISSUE PRESENTED WAS RAISED AND PASSED ON BELOW

As in its opposing brief to the petition for certiorari, Boston Bank again here erroneously asserts that the issue involved was not raised below. That is incorrect. The District Court referred to the National Bank Act ("Bank Act") many times including when it thus held that since Boston Bank "is established in Boston, Massachusetts, within the meaning of 12 U.S.C. Section 94" (Opinion, Appendix 90a), the Bank Act expressly controls.

As discussed in Petitioner's reply to Boston Bank's brief in opposition to certiorari, Petitioner also raised the issue in the Circuit Court. During oral argument there, Petitioner's counsel quoted aloud from *Ronson Corp. v. Liquifin AktiengesellSchaft*, 483 F.2d 852 (3rd Cir. 1973). One member of the Panel asked Samuel Gottlieb, Esq., arguing for Petitioner, if counsel was requesting the Court to overrule *Bruns, Nordeman & Company v. The American National Bank and Trust Company*, 394 F.2d 300 (2d Cir. 1968), cert. den. 393 U.S. 855 (1968). The Court said it would not so overrule. Thus, the Circuit Court too passed on the question in its summary affirmance. Petitioner has done everything reasonable to preserve the record.

POINT II

IT IS NOT NECESSARY FOR THIS COURT TO FIND IMPLIED REPEAL BY THE EXCHANGE ACT 15 U.S.C. SECTION 78aa OF THE NATIONAL BANK ACT 12 U.S.C. SECTION 94 IN ORDER FOR THE MORE LIBERAL EXCHANGE ACT VENUE PROVISIONS TO CONTROL IN THIS SECURITIES CASE.

Respondent and the Amicus, i.e., Chase Manhattan Bank, First National Bank of Chicago, and the Comptroller, attempt to characterize and limit Petitioner's discussion solely to "implied repeal." This restricted view would of course be helpful to their side since implied repeal is more difficult to establish. But they refuse to deal with the real thrust of Petitioner's argument, that no implied repeal is necessary. Indeed, that major point of Petitioner's argument is merely casually mentioned in a footnote on page 15 of Respondent's brief and is never answered. Thus, everyone would seem to agree that the two venue provisions may co-exist. The real difference of opinion relates to terms of such co-existence.

Respondent and Amicus repeatedly define "co-existence" to mean that the Bank Act must oust the Ex-

change Act. This is based on their faulty premise that Bank Act venue is more "mandatory," "effective," "binding" or "special" than Exchange Act venue and in those fact patterns where both statutes apply (a National Bank as a securities defendant), a conflict is presented which can only be resolved by striking the later act. The erroneous nature of Respondent's premises will be discussed in detail below.

In contrast, Petitioner argues for true co-existence, with each statute given equal weight and each given full scope. Thus, it is totally unnecessary to find implied repeal or in any way to curtail either Congressional enactment.

Bank Act and Exchange Act venues can exist harmoniously together; each may encompass its own sphere. The Exchange Act merely adds an additional forum when a bank is sued for a securities related cause. For most causes, a bank may only be sued where established. However, when sued for a securities violation, it may also be sued where found or where the bank committed the wrong. Different venue statutes applicable in the same action need not be in conflict; they may be supplementary or complementary.

A. THE TWO VENUE STATUTES ARE EQUALLY APPLICABLE AND ARE BOTH SPECIAL GRANTS OF VENUE.

Respondent's opposing briefs wrongly claim that the Bank Act offers a special venue statute, while the Exchange Act is only general. The Exchange Act venue provision is a special statute, cf., *General Electric Corporation v. James Talcott, Inc.*, 271 F.Supp. 699, 704 (S.D.N.Y. 1966).

Chase's Amicus brief, states (p. 4): ". . . a venue provision covering a specific subject must prevail over the federal venue statute of general application and greater

iatitude." In following paragraph S, Chase implies one must make a quantitative judgment as to extent to which a venue statute is special or general and only then may one compare the statutes to determine which controls. Boston Bank concurs (p. 17). Such an argument is convoluted. There is no authority for such a proposition. It is clear what constitutes a general venue statute. 28 U.S.C. §1391 is the general venue statute. Other venue statutes are special. It is simple to determine the scope of the general venue statute. The general statute applies "except as otherwise provided by law."

To claim that one special venue is more special than another is a concept foreign to decisions of this Court. Contrary to assertions by Boston Bank (p. 18), as between two special venue statutes, one is no more mandatory than the other. Certainly *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942), and *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957), do not support such a view. *Fourco* dealt with special venue in conflict with the general venue statute. *Stonite* dealt with a conflict to an exception to the general venue statute.

Such an argument would blur the clear distinction between the general statute and special venue statutes, and would lead to widespread uncertainty and confusion. That both venue statutes at bar are special, remains irrefutable.

Although the Bank Act may be "mandatory" against state law, it is not "mandatory" against another Act of Congress. There is no constitutional objection to Congress subsequently enlarging the scope of bank venue to additional districst in the 1933-4 remedial securities legislation. See SEC Amicus Brief, pp. 19-22 for discussion of concern by the 1933-4 Congress over bank related securities abuses.

Respondent refers to *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963) and *Michigan National Bank v. Robertson*, 372 U.S. 591 (1963), for the proposition that the Bank Act is mandatory. This is accurate where state venue is involved, but not with another special Act of the Congress.

McCulloch v. Maryland, 4 Wheat. 316 (1819) and the Supremacy Clause compel the conclusion that states cannot subject National Banks to venue outside their districts. But no one has suggested any reason why Congress may not do so.

Respondent would have us partially ignore the Exchange Act. This is only for the Congress to do. The Court, in *Ronson, supra*, noted that in *Mercantile*, this Court had not been involved with the Exchange Act. Thus, *Mercantile* or *Michigan National Bank*, are not relevant authority at bar.

Certainly, if a resolution of this case can be found which will leave all Congressional enactments intact, the Court should adopt it. Here that requires recognition of the supplemental and cooperative nature of special venue statutes here involved.

B. THE TWO VENUE STATUTES ARE SUPPLEMENTARY AND NOT IN CONFLICT.

At bar, for the first time, this Court is presented with a case in which both statutes are special. Unless irreconcilable, both are fully applicable as grants of venue and plaintiff may select between them as best serves his rights.

Respondent and the Amicus briefs, in suggesting that Petitioner desires to nullify the Bank Act venue provisions, are actually themselves seeking to nullify those of the

Exchange Act. Instead, by both being fully viable, the Exchange Act merely enlarges the available forums in such specific securities actions.

Chase (Amicus p. 4) argues that previous Supreme Court decisions held the Bank Venue statutes "mandatory", "even though other venue statutes might permit suit elsewhere." But as has been shown, the cases decided by this Court merely indicate that it is mandatory against state law. The suggestion that the Bank Act venue provision is mandatory as against other special federal venue statutes is fallacious.

In accepting this great leap from "mandatory as against state law" to "mandatory as against other special federal venue statutes", without any authority from this Court, the lower courts have often been led to the erroneous conclusion that it is necessary for a plaintiff to find implied repeal. Respondent is suggesting that great leap here also.

McCulloch v. Maryland, supra, also casts doubts upon the contention that the Congress, in enacting the Bank Act, was creating a special privilege for national banks. That is the context in which national banks have long preferred to clothe the Bank Act, one of exceptional special privilege. To the contrary, the Bank Act may have been the necessary means in 1864 by which to remove such banks' prior immunity to suit as a federal instrumentality. At the very least, there is nothing in the history of passage of the Bank Act venue provision which suggests that Congress intended thereby to create an immunity which would transcend all other future federal statutes. Thus, Respondent's argument that when enacting the Exchange Act, the 1934 Congress had no need to incorporate a special venue exemption for national banks, is incorrect. Nothing in the Bank Act can be demonstrated as prohibiting the Congress

from expanding venue for national banks for the special purposes of the Exchange Act.

Boston Bank (pp. 15-17), makes it rather clear why both venue provisions should be fully effective (thus allowing Petitioner his choice of venue). If this Court should not find an implied repeal, that should result in a conclusion that the two venue provisions are capable of coexistence. As stated by Boston Bank (p. 15), in that event this Court must regard each as fully effective. That would mean, at bar, that a national bank may be sued either in its own district or in the district where it commits a securities fraud. Thus, each of the venue provisions remains fully effective.

The rule, *generalia specialibus non derogant*, has no application here (Boston Bank brief p. 15). The maxim has been applied in cases involving substantive enactments. Thus, in *Morton v. Mancari*, 417 U.S. 535, 551 (1974), this Court stated that "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." However, when two special venue statutes are involved, one does not control or nullify the other. If there is a way in which the two can be coordinated and not be repugnant, they are not in conflict; each is a separate grant.

The Congress did not say in 1864 that a national bank could *only* be sued in its district. Rather, it said that it *could* be sued in its district. Later in 1933-1934, it said a national bank in a securities case could be sued in specified additional districts. There is no conflict between those two statements; more so since enactment of the Bank Act venue provisions was not an attempt to grant immunity. Both provisions in 1864 and 1934 are grants of venue; neither is a

restriction. Thus, the Exchange Act venue provision need not operate as a substitute for the Bank Act venue provision, as wrongly suggested at p. 8 of the Comptroller's brief, but rather as an overlapping, but equally valid, added grant of venue.

Contrary to assertions by Boston Bank (p. 18), permitting the two venue statutes to coexist does not mean that banks may only be sued in their own district in securities cases. Rather, it means that banks can be sued only in their own district in all actions other than securities cases; while in securities cases they may be sued either in their own or in such other district as the Securities Act prescribes. This is certainly more logical than Respondent's position that since the statutes coexist, the Bank Act alone must prevail. Boston Bank's view ignores the fact that there is no authority whatever for a proposition that Bank Act venue is more "mandatory", "effective", "binding" or "special" than Exchange Act venue. Since both statutes are on a par, they are either totally repugnant or must be totally supplementary.

If the Court finds them supplementary, each grant of venue is applicable and plaintiff may choose between them precisely as he may choose between federal-question-jurisdiction and diversity-jurisdiction where both are applicable.

If, on the other hand, this Court finds they are totally repugnant, then there would be a partial implied repeal. In either case, the venue selected by Petitioner is valid.

POINT III

JUDICIAL ECONOMY

Apparently, neither Respondent nor either Amicus, chose to respond to Petitioner's contention that Respondent's interpretation of the Bank Act causes a gross waste of judicial economy and efficiency. It would result in plural securities actions being filed in numerous districts when a national bank is in a multi-party suit. This results in a waste of judicial expense and may result in conflicting adjudications, further appeals and similar consequences.

As more fully discussed in Petitioner's brief on the merits, when the principles of Multidistrict Litigation, 28 U.S.C. Section 1407, become involved, the results of proliferation in multiple forums can be more burdensome.

CONCLUSION

For the reasons set forth by Petitioner, it is respectfully submitted that the judgment of the Court of Appeals for the Second Circuit and the District Court for the Southern District of New York, should be reversed with directions that the motion by Boston Bank to dismiss on the ground of improper venue be denied.

Respectfully submitted,

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March 1976

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No. 75-268

In the Supreme Court of the United States

OCTOBER TERM, 1975

HYMAN RADZANOWER, PETITIONER

v

TOUCHE ROSS & CO., ET AL. DEFENDANTS, AND FIRST NATIONAL BANK OF BOSTON, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-268

HYMAN RADZANOWER, PETITIONER

v.

TOUCHE ROSS & CO., ET AL., DEFENDANTS, AND FIRST NATIONAL BANK OF BOSTON, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

OPINIONS BELOW

Neither the United States Court of Appeals for the Second Circuit nor the United States District Court for the Southern District of New York rendered any opinion.

JURISDICTION

The judgment of the District Court granting the motion of respondent First National Bank of Boston to dismiss the action as to it for improper venue was entered on October 21, 1974 (App. 89a). The Court of Appeals affirmed that judgment on May 23, 1975 (App. 94a).

Plaintiff below filed a Petition for a Writ of Certiorari with this Court on August 20, 1975, and this Court granted the petition on October 20, 1975. The jurisdiction of this Court is based on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the narrow venue provision of the National Bank Act requires the dismissal, for improper venue, of an action against a national bank arising under the Securities Exchange Act of 1934, where there is conformity with the subsequently-enacted venue provisions of the latter Act.

STATUTES INVOLVED

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa, provides:

> The district courts of the United States, and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction over violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal action may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district wherein the defendant is found or is an inhabitant or

> transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant * * *.

The venue provision of the National Bank Act, 12 U.S.C. 94, which derives from the National Banking Act of 1863, 12 Stat. 665, provides:

> Actions and proceedings against any association under this Chapter may be had in any district or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

STATEMENT

On July 16, 1974, petitioner instituted a class action in the United States District Court for the Southern District of New York, alleging that the First National Bank of Boston (herein the "Bank") and several other defendants had violated, *inter alia,* the Securities Exchange Act of 1934 in connection with transactions in the securities of Teleprompter Corporation (App. 1a, 13a–25a). The Bank was alleged to have engaged in such violations while conducting banking business in the State of New York (App. 14a). Jurisdiction for the action was based on Section 27 of the Securities Exchange Act, 15 U.S.C. 78aa (App. 14a). The Bank moved in the District Court to dismiss the action as to it on the ground that, as a national banking association organized under the National Bank Act, it may be

sued only in the judicial district in which it was "established," 12 U.S.C. 94[1] (App. 59a).

The district court agreed that venue was not proper in New York, and dismissed the action as to the Bank. On May 23, 1975, the court of appeals, after oral argument on behalf of the respective parties, affirmed the district court's decision from the bench, without opinion.

THE INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

When the Commission deems that any person is violating or is about to violate provisions of the federal securities laws or rules or regulations thereunder, it is empowered to bring suit to enjoin such activities.[2] The venue provisions of the federal securities laws[3] apply to enforcement actions brought by the Commission as well as to private litigation in which viola-

[1] Plaintiff had opposed that motion on the ground that the Bank had waived the venue provisions of the National Bank Act by doing business in New York and by designating the New York Superintendent of Banks to receive service of process for it in connection with that business, as required by New York law, but the district court found that there was no waiver.

[2] See, *e.g.*, Section 20(b) of the Securities Act of 1933, 15 U.S.C. § 77t(b); Section 21(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(e).

[3] See Section 22 of the Securities Act of 1933, 15 U.S.C. 77v; Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa; Section 25 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79y; Section 322 of the Trust Indenture Act of 1939, 15 U.S.C. 77vvv; Section 44 of the Investment Company Act of 1940, 15 U.S.C. 80a–43; and Section 214 of the Investment Advisers Act of 1940, 15 U.S.C. 80b–14.

tions of the securities laws are alleged. The decisions of the courts below, if affirmed by this Court, would have an adverse effect upon the Commission's enforcement activities—a result the Commission believes Congress did not intend. For example, if the venue provisions of the National Bank Act should be held to prevail, the Commission would be precluded from bringing a single enforcement action against all who have committed violations of the securities laws arising out of the same facts if one of the proposed defendants should be a national banking association established in a district where venue might not lie under the securities laws for each of the others. Unless the Commission should forego the action against the bank, it would be required to institute two or more[4] separate actions on essentially the same facts, which would entail a needless expenditure of additional time and resources. Apart from the duplication of effort by the Commission and the courts, there would be other inconveniences. Thus, if the district court in which venue lies as to a defendant national bank should be over 100 miles from the district in which witnesses are located, such witnesses could not be compelled to appear.[5]

[4] *Cf. Levin* v. *Great Western Sugar Company*, 274 F. Supp. 974, 977 (D.N.J.), involving the conflict between the venue provisions of the securities laws and the National Bank Act, where "[t]he moving banks [were] California, Massachusetts, Illinois, and Colorado national banks * * *."

[5] Rule 45(e) of the Federal Rules of Civil Procedure.

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Moreover, specific provision is made in the securities acts for private causes of action for damages,[6] and the courts have implied other private causes of action based on violations of the statutes and rules thereunder.[7] This Court has noted that these private actions for damages provide "a necessary supplement to Commission action." *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432; *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 382. If the venue provision of the National Bank Act should prevail, the increased difficulty and costs involved in bringing such actions against national banks which violate the securities laws might mean that, as a practical matter, suit in many instances could not be maintained against a bank.

SUMMARY OF ARGUMENT

The venue provisions of the Securities Exchange Act are in direct and irreconcilable conflict with the venue provision of the National Bank Act when a national bank is alleged to have committed a securities violation, and in such a situation the provisions of the Securities Exchange Act, as the later-enacted statute, should control—particularly where the policy of the later Act would be frustrated. That this was the intent of Congress in enacting the Secu-

[6] See, e.g., Sections 11 and 12 of the Securities Act of 1933, 15 U.S.C. 77k, 771; Sections 9(e), 16(b) and 18(a) of the Securities Exchange Act, 15 U.S.C. 78i(e), 78p(b) and 78r(a).

[7] See, *e.g.*, *J. I. Case Co.* v. *Borak*, 377 U.S. 426. This Court has noted that "[i]t is now established that a private right of action is implied under § 10(b)" of the Exchange Act. *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 13, n. 9.

rities Exchange Act is suggested by Congress' concern at that time with abuses by banks in securities transactions. By contrast, the policy underlying the venue provision of the National Bank Act, *i.e.*, that banks should not have to transport their records substantial distances, was, by reason of technological advances in communication, document reproduction, and transportation, of only minor significance when the Securities Exchange Act was enacted.

ARGUMENT

THE VENUE PROVISIONS OF SECTION 27 OF THE SECURITIES EXCHANGE ACT SUPERCEDE THE LIMITED VENUE PROVISION OF THE NATIONAL BANK ACT

A. SINCE THE VENUE PROVISION OF THE NATIONAL BANK ACT AND THE VENUE PROVISIONS OF THE SECURITIES EXCHANGE ACT ARE IN DIRECT AND IRRECONCILABLE CONFLICT, THE LATER ENACTED STATUTE SHOULD CONTROL

There can be little doubt that the restrictive venue provision of the National Bank Act is in direct conflict with the more liberal venue provisions of the Securities Exchange Act and that, with respect to suits against national banks under the latter Act, it is not possible to construe both laws in a way that reconciles them and gives effect to each. If the venue provisions of the Securities Exchange Act prevail, plaintiff's suit may be maintained in the Southern District of New York, where it was instituted, and where venue is proper as to the other defendants. If the provision of the National Bank Act governs, the suit cannot be maintained against the

defendant Bank in that district but must be brought in the District of Massachusetts, where the Bank is "established,"[8] and in which district it may be questionable whether venue is proper with respect to all the other defendants.

The usual presumption against implied repeal by a subsequently-enacted statute is inapplicable here, where the conflict is clear and irreconcilable. In such cases, this Court has stated, "the later act to the extent of the conflict constitutes an implied repeal of the earlier one * * *." *Posedas* v. *National City Bank of New York*, 296 U.S. 497, 503. In conformity with this rule, the Court of Appeals for the Third Circuit, in *Ronson Corp.* v. *Liquifin Aktiengesellschaft*, 483 F. 2d 852, determined that the venue provisions of the Securities Exchange Act should be deemed a *pro tanto* repeal of the conflicting venue provisions of the National Bank Act.

This Court has considered the issue of implied repeal of the federal antitrust laws in the context of a variety of regulatory schemes and procedures. Most recently, the Court held that the earlier antitrust laws were repealed to the extent necessary to make the regulatory scheme established by Congress in the federal securities laws work where the policies of

[8] The district in which a bank is deemed "established" under 12 U.S.C. 94 has been held to be the district in which it has its principal place of business as recited in its charter. *Leonardi* v. *Chase National Bank*, 81 F. 2d 19 (C.A. 2), *certiorari denied*, 298 U.S. 677; *Buffum* v. *Chase National Bank*, 192 F. 2d 58 (C.A. 7), *certiorari denied*, 342 U.S. 944.

these two statutory schemes were in conflict. In *United States* v. *National Association of Securities Dealers, Inc.*, No. 73-1701 (June 26, 1975), the Court had under consideration certain restrictive agreements between underwriters and broker-dealers with respect to trading in mutual fund shares which "normally would constitute *per se* violations of § 1 of the Sherman Act." The Court found, however, that there was no way to reconcile the authority given the Securities and Exchange Commission by Congress in Section 22(f) of the Investment Company Act of 1940, 15 U.S.C. 80a-22(f), to permit such restrictive agreements with the Sherman Act's declaration that they are illegal per se. The Court concluded that "[h]ere implied repeal of the antitrust laws is 'necessary to make the [regulatory scheme] work.'" —— U.S. at ——, 43 U.S.L.W. at 4981.

Similarly, in *Gordon* v. *New York Stock Exchange*, No. 74-304 (June 26, 1975), this Court held that implied repeal of the antitrust laws was necessary to give effect to the legislative provisions of the Securities Exchange Act wtih respect to Commission supervision of exchange commission rates. The "axioms of construction" which these and similar earlier cases have "clearly established," this Court there stated, are that "repeal of the antitrust laws by implication is not favored and not casually to be allowed," but "where there is a 'plain repugnancy be-

tween the antitrust and regulatory provisions' " repeal will be implied.[9]

Similarly, it has been held that even general procedural requirements subsequently enacted will prevail over specific but clearly inconsistent prior procedural provisions. Thus, in *Elof Hansson, Inc.* v. *United States,* 178 F. Supp. 922, 926 (Cust. Ct.), *rev'd on other grounds,* 296 F. 2d 779 (C.A. 3), *certiorari denied,* 368 U.S. 899, a three-judge court held that the general rulemaking provisions of the Administrative Procedure Act supersede the specific procedural provisions relating to the sale of foreign commodities within the United States set forth in the Antidumping Act of 1921, because it was found that "the provisions of [the] two acts are irreconcilable, * * *" and, accordingly, "the later statute repeals the earlier one to the extent of the conflict." [10]

[9] See also, *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350–351; *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117, 126; *Hughse Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 385–389; *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 217–218; *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357–358; *United States* v. *Borden Co.*, 308 U.S. 188, 198–199.

[10] The Administrative Procedure Act itself, despite a provision in Section 12 thereof, 5 U.S.C. 559 (formerly 5 U.S.C. 1011), that "[n]o subsequent legislation shall be held to supersede or modify the provisions of this * * * [Act] except to the extent that such legislation shall do so expressly," has been held to be overruled by the Deportation Act of 1952, insofar as the latter statute provided an "exclusive procedure for determining deportability of an alien," even though no reference to the Administrative Procedure Act was made. *Marcello* v. *Ahrens*, 212 F. 2d 830 (C.A. 5), *affirmed sub nom. Marcello* v. *Bonds*, 349 U.S. 302.

In the instant case, the conflicting venue provisions of the two statutes involved cannot be reconciled but are "repugnant" in both their policies and in their practical effects. The venue provision of the National Bank Act is a provision designed for the convenience of national banks (see discussion *infra,* pp. 14–15); the venue provisions of the Securities Exchange Act, on the other hand, are an integral part of a law designed to favor plaintiffs, including this Commission, bringing actions under the Securities Exchange Act to ensure that all defendants involved in a multi-party, multi-state fraud could be joined in one suit in one court. And in the practical effect of the application of these two statutes, the conflict is most clear.

The Bank argues that "[t]his Court has specifically held that where particular venue provisions have been enacted by Congress, the broader language of a general statute does not supersede the specific legislation even though it may be literally applicable." [11] The purported distinction, however, is not valid. The venue provisions of the Securities Exchange Act are not general but special, as the courts have noted.[12] Although they are not confined to one kind of defendant, as is the venue provision of the National Bank Act, they

[11] Brief in Opposition to the Petition for a Writ of Certiorari, at page 8.

[12] *Black & Company* v. *Nova-Tech, Inc.*, 333 F. Supp. 468, 473 (D. Ore.); *Securities and Exchange Commission* v. *Wimer*, 75 F. Supp. 955, 961 (W. D. Pa.); *Lorenz* v. *Watson*, 258 F. 2d 724, 729 (E. D. Pa.).

are confined to one type of action, that is, an action arising under the federal securities laws.[13]

B. THE POLICIES UNDERLYING THE VENUE PROVISIONS IN ISSUE HERE REQUIRE THE APPLICATION OF THE SECURITIES EXCHANGE ACT PROVISIONS.

As this Court has consistently stated, the provisions of the federal securities laws, "enacted for the purpose of avoiding frauds," must be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes." *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (Investment Advisers Act of 1940); *accord, Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (Securities Exchange Act); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (Securities Exchange Act); see *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, 353–354 (Securities Act); *Superintendent of Insurance* v.

[13] Indeed, in *Burd* v. *McCullough*, 217 F. 2d 159 (C.A. 7), the court characterized one statute relating to the nature of the action as being "limited to a specific situation," while characterizing another statute relating to the type of person involved in the lawsuit as being "general." That case involved two Indiana statutes, analogous to the two federal statutes here involved—an earlier statute relating to the type of person involved and a conflicting later statute relating to a particular type of action. The earlier statute provided that persons acquiring causes of action during their minority could bring such actions within two years of attaining their majority. The later statute precluded any malpractice action for damages unless "filed within two years from the date of the [allegedly wrongful] act * * *" The court held that under applicable principles of statutory construction, the later controlled.

Bankers Life & Casualty Co., 404 U.S. 6, 12 (Securities Exchange Act). The broad remedial purpose of these laws is clearly set forth in their respective legislative histories. The Securities Exchange Act of 1934 was enacted in response to "the speculative orgy of 1928 and 1929," S. Rep. No. 1455, 73d Cong., 2d Sess. 81 (1934), and a presidential call for securities "legislation [that] has teeth in it." H.R. Rep. No. 1383, 73d Cong., 2d Sess. 2 (1934). Necessarily, Congress recognized the national rather than local nature of the problems involved in this area and the fact that the law's remedial provisions would have to be complementary.[14]

The provision that venue for actions arising under the securities laws may lie in several alternative districts exemplifies the liberal approach taken in these statutes. As one court has noted, one of the purposes of Section 27 of the Securities Exchange Act is "to do away with limitations on venue. * * *" *Fistel* v. *Beaver Trust Co.*, 94 F. Supp. 974, 976 (S.D.N.Y.). As indicated in the Conference Report on the Securities Act of 1933, H.R. Rep. No. 152, 73d Cong., 1st Sess. 27 (1933), Congress explicitly displayed its concern with the scope of the venue provisions of that Act. The House bill, H.R. 5480, "limited the venue of actions brought * * * to enforce civil liabilities * * * to the district in which the defendant was an in-

[14] The Securities Exchange Act was intended to cover "a wide field," since none of the evils which the legislation aims at could "be isolated for cure of itself alone." H.R. Rep. No. 1383, 73d Cong., 2d Sess. 6 (1934).

habitant or had its principal place of business or in the district where the sale took place. The Senate amendment extended this provision to permit suit in the district where the defendant might be found or where he transacts business." The legislation adopted incorporated the Senate provision. Thus, in the case of business entities, venue was enlarged to include not only the district where the principal office of the defendant was located, as specified in the National Bank Act, but to reach other districts as well. And, as noted *supra,* note 3, provisions for expanded venue were included in each of the subsequently-enacted securities laws.

The Congressional policy embodied in the federal securities laws is fully as vital today as when those laws were first enacted, if not more so. The Conference Report on legislation which enacted far-reaching amendments to the Securities Exchange Act several months ago stated: "The basic goals of the Exchange Act remain salutory and unchallenged: To provide fair and honest mechanisms for the pricing of securities, to assure that dealing in securities is fair and without undue preferences or advantages among investors. * * *" H.R. Rep. No. 94–229, 94th Cong., 1st Sess. 91 (1975).

By contrast, the policy underlying the enactment of the venue provision of the National Bank Act in 1863 can today only be considered of minor significance. The restrictive venue provision contained in the National Bank Act has its roots in the National Banking Act of 1863, 12 Stat. 665, replaced a year later by

the Act of 1864, 12 Stat. 99. By Section 11 of the 1863 Act, the banking associations were given general corporate powers, among them the power to "sue and be sued * * * in any court of law or equity as fully as natural persons." Section 59 of that Act provided that suits by and against any association under the Act could be had in any federal court held within the district in which the association was established.[15] This provision has continued in effect to the present, appearing today as 12 U.S.C. 94.

This Court has observed that this limited venue provision was "prescribed for the convenience of those institutions [i.e., national banks], and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process. * * * *Mercantile National Bank* v. *Langdeau,* 371 U.S. 555, 561–562, n. 12. See also *Bank of Bethel* v. *Pahquioque Bank,* 14 Wall. 383, 394; *Crocker* v. *Marine National Bank,* 101 Mass. 200; *Chaffee* v. *Glens Falls National Bank & Trust Co.,*

[15] The next year, in Section 57 of the Banking Act of 1864, 13 Stat. 116–117, Congress expressly permitted banks to be sued in state courts, while carrying forward the venue provision with respect to suits in federal courts. The venue provision was omitted from Title 62 (National Banks) of the Revised Statutes of 1873, but at the time there was included in Section 563 of Title 13 (The Judiciary) provisions derived from Section 57 of the 1864 Act granting the federal courts jurisdiction over suits by and against national banks brought in the district of their residence. In 1875, Title 62 was amended by the Act of February 18, 1875, 18 Stat. 320, by adding provisions to Section 5198 of Title 62 substantially identical to Section 57 of the 1964 Act. The portion of Section 5198, Rev. Stat. (1878), derived from Section 57 of the 1864 Act, has been codified as 12 U.S.C. 94.

204 Misc. 181, 123 N.Y.S. 2d 635, *affirmed,* 283 App. Div. 694, 128 N.Y.S. 2d 539; T Michie, *Banks and Banking* (Willson et al. eds.), § 220a(4) (1973). Indeed, as this Court has explained, the only reason for the National Bank Act venue provision is "the convenience of the bank." *Mercantile National Bank* v. *Langdeau, supra,* 371 U.S. at 562, n. 12.

We submit that the convenience of a bank is not a weighty consideration when contrasted with the congressional policy which is expressed in the federal securities laws. As stated in *Carpenter* v. *Hall,* 352 F. Supp. 806, 810 (S.D. Tex.), "modern facilities for reproduction and transportation could not have been imagined" in the last century. "Today Xerox-type copy machines are as readily available as typewriters, and no two cities are as much as half a day apart." [16] Similarly, another court has noted that the inconvenience and interruption of a bank's business which would have resulted in the mid-nineteenth century if banks were subject to jurisdiction in courts located in places other than where they were established

> * * * have today been mitigated, if not, in fact, minimized, by present modes of rapid transportation and communication and by mechanical and electronic accounting systems and photostatic and microfilming processes, among others, and the present pretrial practice and liberalization of the rules respecting documentary evidence have further eased the burden incident to litigation in which banks may be involved. Thus the supposed objective of the statute has been in large part attained through other means.

Chaffee v. *Glens Falls National Bank & Trust Co.,* 123 N.Y.S. 2d 635, 638 (Sup. Ct.), *affirmed,* 128 N.Y.S. 2d 539 (App. Div), *appeal denied,* 129 N.Y.S. 2d 237. The same court went on to note that, in modern times, "* * * the activities of even the smallest banks have expanded far beyond the limits of the cities and villages in which these banking houses are located," and a rule that banks can only be sued in their place of establishment is today "unnecessarily harsh."

In contrast, as noted in *Carpenter, supra,* 352 F. Supp. at 810, "the national impact of securities fraud, a by-product of modern communication technology, was already a major threat when Congress passed the 1933 and 1934 Acts." This fact was not unnoticed by the Congress when it was considering the legislation which became the Securities Exchange Act. While observing that in former years, securities transactions were carried on by relatively few people, in recent years, "due largely to development of the means of communication—the expanding network of telephone, telegraph, ticker, radio, and newspaper facilities—the

[16] The limited venue provision of the National Bank Act, as the Court of Appeals for the Third Circuit noted, has been the subject of "severe criticism," *Ronson Corp., supra,* 483 F. 2d at 855. The American Law Institute, Study of the Jurisdiction Between State and Federal Courts (1969) p. 412–413, has recommended repeal, observing that "[t]here is no obvious reason why a national bank requires a unique and restrictive venue rule, and cannot be treated as is any other corporation for purpose of venue." *See also* "An Assault on the Venue Sanctuary of National Banks," 34 Geo. Wash. L. Rev. 765 (1966).

entire Nation has become acutely sensitive to the activities of securities exchanges."[17] Accordingly, it found that "[t]ransactions in securities on organized exchanges and over-the-counter markets are affected with a national public interest," requiring regulation.[18]

Thus, the Court of Appeals for the Third Circuit, in holding that the venue provisions of the Securities Exchange Act supersede that of the National Bank Act, was "guided by the realization that the Securities Exchange Act must be liberally interpreted in order to accomplish the congressional objects of regulating the securities markets and of affording proper disclosure to the investing public, as well as preventing fraud in securities trading." *Ronson Corporation v. Liquifin Aktiengesellschaft,* 483 F. 2d 852, 854. And while the Court of Appeals for the Second Circuit has held the National Bank Act venue provision to be controlling, it did so only "with regret," conceding that its decision meant "heavy inconvenience for the plaintiff and a burden for the federal courts, as against the burden on [the bank]—slight in this age of cheap long-distance telephone rates, efficient methods for copying documents and jet air transport—of defending an action in New York rather than in Chicago." *Bruns, Nordeman & Co.* v. *American National Bank & Trust Co.,* 344 F.2d 300, 301, 302–303, *certiorari denied,* 393 U.S. 855.

In *Bruns, Nordeman and Company,* the leading case holding the National Bank Act venue provision con-

[17] S. Rep. No. 1455, 73d Cong., 2d Sess. 5 (1934).

[18] *Id.* See also Section 2 of the Securities Exchange Act, 15 U.S.C. 78b.

trolling, the court expressed the opinion that there had been no intent on the part of Congress to carve out an exception to the older National Bank Act limitation on venue because there was nothing in the legislative history of the venue provisions of the Securities Act or the Securities Exchange Act which explicitly indicated any consideration of the status of national banks. 394 F. 2d at 304. The court further opined that national banks "were hardly envisioned" by the Congress "as likely defendants in actions under the new securities laws."

Two courts which have subsequently considered the matter have strongly disagreed with these conclusions. See *Ronson Corporation, supra,* 483 F. 2d at 854; and *Carpenter* v. *Hall, supra,* 352 F. Supp. at 811 (S.D. Tex). The *Bruns Nordeman* court was apparently unaware that a single report of the Senate Committee on Banking and Currency was presented to the Senate at about the time the Securities Exchange Act was passed, dealing with both securities industry practices and banking activities.[19] The report detailed

[19] Report of the Committee on Banking and Currency, S. Rep. No. 1455, 73d Cong., 2d Sess (1934). This resulted from a resolution in the 72d Congress "to investigate practices of stock exchanges with respect to the buying and selling and the borrowing and lending of listed securities," and from resolutions in the 73d Congress "to investigate the matter of banking operations and practices, transactions relating to any sale, exchange, purchase, acquisition, borrowing, lending, financing, issuing, distributing, or other disposition of, or dealing in, securities or credit by any person or firm, partnership, company, association, corporation, or other entity, with a view toward recommending necessary legislation under the taxing power or other federal powers."

various abuses on the part of investment [20] and commercial banks [21] in connection with transactions in securities. Commercial banks were found to have violated their fiduciary duties to depositors, stockholders and investors by such practices as improperly promoting to their depositors, who were seeking disinterested investment counsel from their bankers, securities in which the bank or their affiliates had a pecuniary interest.[22] Banks employed, through investment affiliates, "many salesmen throughout the Nation to quickly sell the securities issues" they were promoting.[23] Commercial banks used their affiliates "not only to circumvent the law forbidding banks to purchase and sell their own capital stock, but to participate in speculative ventures in such capital stock." [24] Banks and their officers and other insiders organized pool operations [25] to manipulate their own stock, and did not hesitate to sell that stock short when profits could be made by so doing.[26] Bank officers held numerous directorships in various public companies and often "assumed the inconsistent position of representing conflicting interests when passing upon loans" to corporations in which

[20] S. Rep. No. 1455, 73d Cong., 2d Sess. at 83–153.
[21] *Id.* at 155–229.
[22] *Id.* at 163.
[23] *Id.* at 166.
[24] *Id.* at 168.
[25] The report defines a pool operation as a manipulative device involving an agreement between several people actively to trade in a single security, generally for the purpose of raising the price of a security and enabling the holders to unload their holdings at a profit upon the public attracted by the activity or the information disseminated about the stock. Such devices, the report found, were "incompatible with the maintenance of a free and uncontrolled market." *Id.* at 31.
[26] *Id.* at 192–195.

they were interested.[27] "Banking officials who were officers and directors of private corporations availed themselves of inside information of corporate condition and activities for their transactions in the corporation [sic] securities." [28] Commercial banks "consistently" made false statements of material facts to their stockholders and "issued financial statements * * * which obfuscated the true condition of the banks' affairs." [29]

These conditions then prevalent in commercial banking circles, the Congressional report observed, "cast a sombre reflection upon the ethical standards of the banking fraternity." [30] And the report concluded that only a "reawakened consciousness of the solemnity of the trust imposed upon them" could excise the predominant "moral and ethical pathology" found not only in the great financial centers but throughout the nation.[31]

Thus, contrary to the belief expressed in *Bruns, Nordeman,* Congress undoubtedly had these abuses in the banking and securities industries in mind when it passed the Securities Exchange Act, recognizing that "[s]peculation, manipulation, * * * investors' ignorance, and disregard of trust relationships by those whom the law should regard as fiduciaries" were "all a single seamless web." [32] In enacting laws designed

[27] *Id.* at 203.
[28] *Id.*
[29] *Id.* at 211.
[30] *Id.* at 214.
[31] *Id.* at 221.
[32] H.R. Rep. No. 1383, 73d Cong., 2d Sess. 6 (1934).

to provide full and fair disclosure of the character of securities sold in interstate commerce, and to prevent frauds in connection with those interstate sales, the Congress was, as noted above, being responsive to a presidential call for securities "legislation [that] has teeth in it." H.R. Rep. No. 1383, 73d Cong., 2d Sess. 2 (1934). And, as noted by the court in *Carpenter* v. *Hall, supra,* 302 F. Supp. at 809–810, "[t]he jurisdictional and venue provisions of the federal securities laws *are* the teeth for the enforcement of this important legislation" [*emphasis supplied*]. We submit that these teeth should not be pulled out by an unduly narrow reading of the venue provisions of the Securities Exchange Act.

CONCLUSION

The judgment of the court below affirming the dismissal of the complaint as to the First National Bank of Boston should be reversed.

Respectfully submitted.

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DECEMBER 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
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No. 75-268

HYMAN RADZANOWER,

Petitioner,

v.

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W.J. BRESNAN, H.J. SCHAFLY, LEONARD TOW, R.C. TODD, JR., B.P. SIMON, J.B. GREEN, L.H. READ, R. G. WILSON, H. E. FLAHERTY, B. D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R.F. LEWIS, P.L. LOWE, CHARLES LUCKMAN, M.B. MITCHELL, A.E. PUCKETT, J.H. RICHARDSON, M.E. LIVINGSTON, JACK WRATHER, FIRST NATIONAL BANK OF BOSTON,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE COMPTROLLER OF THE CURRENCY AS AMICUS CURIAE

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IN THE

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No. 75-268

HYMAN RADZANOWER,

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OPINIONS BELOW

Neither the United States Court of Appeals for the Second Circuit nor the United States District Court for the Southern District of New York rendered any opinion.

JURISDICTION

The judgment of the District Court granting the motion of respondent First National Bank of Boston to dismiss the action as to it for improper venue was entered on October 21, 1974 (App. 89a). The Court of Appeals affirmed that judgment on May 23, 1975 (App. 94a).

Plaintiff below filed a Petition for a Writ of Certiorari with this Court on August 20, 1975, and this Court granted the petition on October 20, 1975. The jurisdiction of this Court is based on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Congress intended the venue provision of the Securities Exchange Act of 1934 to repeal the earlier enacted venue provision of the National Bank Act.

STATUTES INVOLVED

The venue provision of the National Bank Act, 12 U.S.C. 94, which derives from the National Banking Act of 1863, 12 Stat. 665, provides:

> Actions and proceedings against any association under this Chapter may be had in any district or territorial court of the United States held within

> the district in which such association may be established, or in any state, county, or municipal court in the county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa, provides:

> The district courts of the United States, and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction over violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal action may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant* * *.

STATEMENT

On July 16, 1974, petitioner instituted a class action in the United States District Court for the Southern District of New York, alleging that the First National Bank of Boston (herein the "Bank") and several other defendants had violated, *inter alia*, the Securities Exchange Act of 1934 in connection with transactions

in the securities of Teleprompter Corporation (App. 1a, 13a-25a). The bank was alleged to have engaged in such violations while conducting banking business in the State of New York (App. 14a).

The petitioner's complaint alleges that the respondent bank had inside information respecting the financial condition of respondent Teleprompter by virtue of its function as lender to Teleprompter (App. 17a-24a). The complaint attempts to develop a Rule 10(b)(5) violation by alleging that the respondent bank had a duty to disclose to the public, the Securities and Exchange Commission or the New York Stock Exchange, the information gained as lender when the respondent Teleprompter made public statements which were in conflict with the information possessed by the Bank. (App. 17a-24a). The bank is not alleged to have engaged in any transactions in the subject security or profited from any transaction in the security or to have had communication or contact with petitioner, either in New York or elsewhere.

Jurisdiction for the action was based on Section 27 of the Securities Exchange Act, 15 U.S.C. 78aa (App. 14a). The Bank moved in the District Court to dismiss the action as to it on the ground that, as a national banking association organized under the National Bank Act, it may be sued only in the judicial district in which it was "established", 12 U.S.C. 94[1] (App. 59a).

[1] Plaintiff had opposed that motion on the ground that the Bank had waived the venue provisions of the National Bank Act by doing business in New York and by designating the New York Superintendent of Banks to receive service of process for it in connection with that business, as required by New York Law, but the District Court found that there was no waiver.

The District Court agreed that venue was not proper in New York, and dismissed the action as to the Bank. The District Court was not asked to pass on the question before this Court; the only question which petitioner asked the District Court to decide was whether or not the bank had waived its venue privilege under 12 U.S.C. § 94 (App. 75a-78a; App. 83a-88a; App. 89a). On May 23, 1975, the Court of Appeals, after oral argument on behalf of the respective parties, affirmed the District Court's decision from the bench, without opinion.

INTEREST OF THE COMPTROLLER OF THE CURRENCY

The Comptroller of the Currency (hereinafter the "Comptroller") has specific bank supervisory responsibility over all national banks, including respondent First National Bank of Boston. The Comptroller's supervisory responsibility includes the periodic examination of all national banks and the approval or disapproval of applications to charter new national banks.

National banks have sought their charters and operated upon the assumption that they could be sued only in accordance with 12 U.S.C. § 94. The Comptroller believes that if this legislatively granted privilege is to be repealed, it should be done only by Congress after consideration of all the policy implications involved, and not done by the courts through an inappropriate application of the doctrine of implied repeal. Such use of the doctrine of implied repeal could establish an unfortunate precedent in respect to other potential conflicts between the National Bank Act and the Securities Acts.

SUMMARY OF ARGUMENT

Nothing in the legislative history of the Securities Acts suggests that Congress intended the venue provision of the Securities and Exchange Act of 1934 to supersede the venue provisions applicable to national banks, 12 U.S.C. § 94. On the contrary, Congress seems to have dealt with securities problems relating to banks by other specific statutory provisions related to banks, such as the separation of investment banking and commercial banking found in the Glass-Steagall Act and the margin requirements found in the Securities Exchange Act of 1934, 15 U.S.C. § 78g and h. Banks' securities and banks themselves were given specific exemptions both in the 1933 and 1934 Securities Acts.

There is no reason, in the absence of specific congressional intent, to find that the venue provision of the Securities Exchange Act of 1934 repeals that of the National Bank Act. All substantive provisions of the Securities Acts still can be given effect even though the National Banks Act's venue provision is upheld. Thus, under the standards enunciated by this Court in *Posadas v. National City Bank*, 296 U.S. 497 (1936) and *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the later-enacted general venue provision of the 1934 Securities Act does not repeal the earlier specific provision governing litigation against national banks.

ARGUMENT

THE VENUE PROVISION OF THE SECURITIES EXCHANGE ACT OF 1934 DOES NOT REPEAL, EITHER EXPRESSLY OR BY IMPLICATION, THE VENUE PROVISION OF THE NATIONAL BANK ACT.

A. Application of This Court's Recently Reaffirmed Standard for Implied Repeal Demonstrates that this Doctrine is Inappropriate to the Case at Bar.

The Securities and Exchange Commission argues in its *amicus* brief to this Court that the venue provisions of the Securities Exchange Act repeal *pro tanto* the earlier enacted venue provisions of the National Bank Act to permit a suit against a national bank charged with a securities law violation in the district where the sale is alleged to have occurred. This argument has been accepted by the Third Circuit. *Ronson Corp. v. Liquifin Aktiengesellschaft*, 483 F.2d 852 (3rd Cir. 1973). This same argument has been rejected by the Second and Ninth Circuits, *Bruns-Nordeman & Co. v. American National Bank & Trust Co.*, 394 F.2d 300 (2nd Cir.), *cert. denied*, 393 U.S. 855 (1968), *United States National Bank v. Hill*, 434 F.2d 1019 (9th Cir. 1970). The Comptroller believes that the result reached by these latter two courts is better reasoned.

It is, of course, plain that there is no express repeal of 12 U.S.C. § 94 by the Securities Acts. Moreover, the application of the canons of statutory construction does not support the contention that the venue provisions of the National Bank Act have been repealed by implication by the later enacted venue provisions of the Securities Exchange Act of 1934.

The classic statement of the rule regarding repeals by implication appears in this Court's decision in *Posadas v. National City Bank*, 296 U.S. 497 (1935). In that case, which upheld the inapplicability of a territorial tax on a national bank on the ground that it would amount to a tax on the sovereign, the Court declared:

> The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication – (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. *But, in either cases, the intention of the legislation to repeal must be clear and manifest;* otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment. [Emphasis supplied.]

296 U.S. 497 at 503. Similarly, in *United States v. Borden Co.*, 308 U.S. 188 (1939), this Court reiterated the requirement that to find a repeal by implication the "intention of the legislature to repeal 'must be clear and manifest.' " 308 U.S. 188 at 198.

Applying the standards from *Posadas*, it is clear that the venue provisions of the securities laws were not intended by Congress as a substitute for the venue provisions of the National Bank Act.

First, an examination of the language and legislative history of the Exchange Act does not disclose any expression by Congress or other manifestation which

would support a finding that Congress intended the venue provisions of the Securities laws to constitute a repeal of the earlier enacted venue provisions of the National Bank Act.[2]

Second, the statutes deal with entirely different subject matters. While the venue provisions of the Securities Acts are special as compared with the general venue provisions regarding suits in the federal courts (*see* 28 U.S.C. § 1391, *et seq.*), the language is expressed in general terms as being applicable to defendants. On the other hand, the provisions of 12 U.S.C. § 94, which antedate the securities laws, specifically limit suits against national banks to the district in which the bank was established.

The enactment of a general law broad enough in its scope and application to cover the field of operation of a special or local statute usually does not repeal a statute which limits its operation to a particular phase of the subject covered by the general law, or to a particular locality within the jurisdictional scope of the general statute.[3] This general rule was followed in *Rosencrans v. United States*, 165 U.S. 257 (1897), where this Court held that a later statute which appeared to distribute jurisdiction between the divisions of the district court did not overrule a prior grant of jurisdiction. The Court declared:

> The question is a difficult one, and yet we think the true rule of construction is this: When there

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[2] *Cf., Bruns-Nordeman & Co. v. American National Bank & Trust Co.*, 394 F.2d 300 at 303-04 (2nd Cir.), *cert. denied*, 393 U.S. 855 (1968) and *General Electric Credit Corp. v. James Talcott, Inc.* and *Franklin National Bank*, 271 F. Supp. 699 (S.D. N.Y. 1966).

[3] Sutherland, *Statutes and Statutory Construction* (4th ed.) Vol. 1A, p. 245 (Section 23.15).

> are statutes clearly defining the jurisdiction of the courts the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. In other words, where Congress has expressly legislated in respect to a given matter that express legislation must control, in the absence of a subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation. . . ..

165 U.S. at 262.

In short, Congress has seen fit to establish a special privilege regarding the venue of suits against national banks. This special status would require some clear expression of congressional intent to rescind the privilege.

Finally, the statutes are not in irreconcilable conflict since it is evident that they can be made to work together.[4] It is clear that a suit could be brought against the defendant national bank in the district court in Boston, seeking the same relief which is sought in the instant action. Thus it is evident that effect can be given to the National Bank Act venue provision and the securities laws without finding an irreconcilable conflict and therefore an implied repeal.

The federal courts have consistently applied this reasoning to reject arguments to the effect that the venue provisions of the National Bank Act were impliedly repealed by later federal statutes. For example, in *Buffum v. Chase National Bank of the City of New York*, 192 F.2d 58 (7th Cir., 1951), *cert. denied*, 342 U.S. 944, (1951) the Court of Appeals for the Seventh

[4] *See Bruns-Nordeman, supra* at 304.

Circuit held that the 1948 revision of the judicial code, which contained a venue provision in 28 U.S.C. § 1391 allowing suits against a corporation wherever it is doing business, did not repeal the earlier enacted venue provision of the National Bank Act. The decision in *Buffum* followed the similar holding of the court in *International Refugee Organization v. Bank of America*, 86 F. Supp. 884 (S.D. N.Y. 1949).[5] Both cases were cited by this Court with approval in its decision in *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963).

The Commission suggests in its brief (p. 11), that the venue provisions of the securities laws were designed to obviate the necessity of instituting a multiplicity of suits in order to enforce the substantive provisions of the Act, thus requiring repeal of Section 94. But the desirability of obviating the necessity of a multiplicity of suits as well as of avoiding the burden of pursuing a defendant to a distant jurisdiction when such defendant transacts business in the plaintiff's jurisdiction, are considerations which antedate the provisions of the Securities and Exchange Acts and are not peculiar to them. Nonetheless, this Court in the *Langdeau* case, *supra*, specifically rejected such arguments as insufficient to outweigh the clear provisions of the National Bank Act. The Court said:

> The consequence of our decision, appellee says, is that a litigant will be unable to join two national banks in the same action in the state courts if they are located in different counties or in the federal courts if they are located in different districts. But

[5] *Cf. Fistel v. Beaver Trust Co.*, 94 F. Supp. 974 (S.D. N.Y. 1950).

> aside from not being presented by these cases, such a situation is a matter for Congress to consider. . . .
>
> Similarly, even if all of the 145 defendants may not be sued in one proceeding in Dallas County with the same facility as they may in Travis County, this, of course, is insufficient basis for departing from the command of the federal statute.

371 U.S. at 563-6.

Similarly, in *Michigan National Bank v. Robertson*, 372 U.S. 591 (1963), this Court rejected the contention that the burden of pursuing a national bank to its home state hundreds of miles away militated against the strict application of the venue provision of the National Bank Act. Plaintiffs in that case purchased house trailers in Nebraska and executed notes and lien instruments to a local dealer who in turn negotiated them to a national bank whose principal office was in Michigan. The plaintiffs alleged violations of the Nebraska Installment Loan Act and challenged the validity of the transactions and the documents executed in connection therewith. This Court held, however, that by reason of 12 U.S.C. § 94, the Michigan Bank could not be involuntarily sued in Nebraska although it was doing business there. Accordingly, the case was remanded solely for the purpose of determining whether the bank had waived its venue privilege,[6] despite the criticism of the "harsh result" by Justices Black and Douglas in their concurring opinion (372 U.S. at 595).

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[6] On remand, the Nebraska Supreme Court held that the national bank had not waived the venue of the Nebraska court. *Hills v. Burnett*, 175 Neb. 871, 125 N.W.2d 66 (1966).

In *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the contention was made that the Securities Exchange Act had repealed certain provisions of the antitrust laws. The Court rejected that argument, saying:

> The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication and '[i]t is a cardinal principle of construction that repeals by implication are not favored.' Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and *even then only to the minimum extent necessary*. [Emphasis added; citations omitted.]

373 U.S. at 357.

The Court reaffirmed just last term this same standard for implied repeal, although that standard was applied to find that the antitrust laws were impliedly repealed to some extent by the securities laws. *See Gordon v. New York Stock Exchange*, ____ U.S. ____, 45 L.Ed.2d. 463 (June 26, 1975) and *United States v. National Association of Securities Dealers, Inc.*, ____ U.S. ____, 45 L.Ed.2d 486 (June 26, 1975). The Securities and Exchange Commission relies heavily on these decisions to support its contention of implied repeal respecting 12 U.S.C. § 94. In both these cases, however, this Court was confronted with a situation where the regulatory scheme envisioned by Congress simply would not work if the antitrust laws were to prevail. *See Gordon, supra*, 44 L.Ed.2d 463 at 481 and *National Association of Securities Dealers, Inc., supra*, 45 L.Ed.2d 486 at 513.

To summarize, the principal considerations urged for holding that the venue provisions of the Securities Exchange Acts should repeal *pro tanto* 12 U.S.C. § 94 are hardships to investors, multiplicity of suits, and complications of enforcement of the Securities Exchange Act. This Court has, in other contexts, rejected the consideration of multiplicity of suits and hardships to investors as reasons for overriding the specific venue limitation in the National Bank Act. *See Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963) and *Michigan National Bank v. Robertson*, 372 U.S. 591 (1963) discussed above. It is clear that all applicable substantive provisions of the Securities Acts still are available to petitioner, even though there is but one judicial district in which respondent may be sued. Thus, there does not here exist the type of irreconcilable conflict between two statutes which this Court consistently has required before finding that Congress intended to repeal the earlier enacted statute.

B. Congress Expressed no Intent, in Passing the Securities Laws, to Repeal the Venue Provision of the National Bank Act.

In *Bruns-Nordeman & Co., supra*, the Second Circuit noted that, when the 1933 and 1934 Securities Acts were passed, national banks were under extensive supervision by the Comptroller and "... were hardly envisioned as likely defendants in actions under the new Securities Laws." 394 F.2d at 304. The court referred specifically to the House Committee Report[7] showing

[7]H. Rep. No. 85, 73rd Cong., 1st Sess., 14 (1933).

that Congress expressly relied on the Comptroller when, in the 1933 Act, it exempted securities of national banks from the requirement of registering and from civil liability for fraud in their distribution. *Ibid.*

The Commission in its *amicus* brief (p. 19) attempts to rebut the Second Circuit's conclusion by referring to a 1934 report of the Senate Committee on Banking and Currency, and speculating that the court was unaware of the report.[8] This report was a general survey of problems confronting the Congress, and – unlike the House Report referred to by the Second Circuit – did not accompany or report upon any specific statute. Additionally, most of the problems discussed in that report were dealt with either by other legislation or by no federal legislation at all. For example, the Commission refers (brief, p. 20) to the Senate Report's conclusion that banks were found to have violated their fiduciary duties to depositors, stockholders and investors by such practices as improperly promoting to their depositors, who were seeking disinterested investment advice, securities in which the bank or its affiliates had a pecuniary interest. This problem, however, was handled not by the Securities Act, but by the Glass-Steagall Act.[9] *See Investment Company Institute v. Camp*, 401 U.S. 617 (1971). The Commission also refers (brief, p. 20) to the Senate Report's assertion that bank officers held numerous directorships in

[8]Sen. Comm. on Banking and Currency, Sen. Rep. No. 1455, 73rd Cong., 2d Sess. (1934).

[9]The Glass-Steagall Act is found in the Banking Act of 1933 and amendments of 1935, 12 U.S.C. § 21, *et seq.*

various public companies and often assumed the inconsistent position of representing conflicting interests when passing upon loans. No statute limits this practice, unless the facts of a particular case could be construed to be a misapplication of funds prohibited by 18 U.S.C. § 656.

That Congress was concerned with the role played by banks and bankers in the disastrous events leading up to passage of both the Securities Acts and the Glass-Steagall Act is undisputed. But it seems equally clear that Congress intended to deal with these problems by ways other than a wholesale application to banks of the provisions of the securities laws. For example, the problem of speculation fueled by margin purchases is dealt with in the Securities Act of 1934 but interestingly, not through the Securities and Exchange Commission, but through the Federal Reserve Board. *See* 15 U.S.C. § 78g and h. As Judge Friendly aptly noted, Congress exempted banks from the securities registration requirements of the 1933 Act. *Bruns-Nordeman & Co., supra*, 394 F.2d 300 at 304. Congress took the same approach in the 1934 Act exempting banks from the definition of "broker" and "dealer" and taking care to define the word "bank" itself. 15 U.S.C. § 78(a)(4)-(6). Since Congress established a separate and specific statutory scheme for dealing with banks and their securities problems, we believe that the *Bruns-Nordeman* court was entirely correct in concluding that banks were hardly envisioned as likely defendants under the securities laws being enacted to apply to non-banking companies and corporations. In any event, the regulation of banks could hardly be said to be such a fundamental purpose of the Securities Acts as to

require that the venue provision of the 1934 Act be given such a broad reading as to require repeal of the venue provision of the National Bank Act in order to effectuate the purposes of the Securities Act.

The concept that a bank such as the defendant bank in this case being privy to inside information as a lender, should be potentially liable under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)(5) promulgated by the SEC thereunder, when its borrower makes statements regarding the same information which are false or misleading certainly was not in Congress' mind when considering the Securities Exchange Act. A bank has a strong fiduciary obligation to its own shareholders and depositors which would mitigate against publicly disputing a borrower's statements of condition. Such a course of action could weaken the borrower and possibly precipitate a default on the loan. As the Court in *Bruns-Nordeman & Co.* points out, we cannot be sure how Congress would balance such interests against those of potential securities plaintiffs, and how any such balance would impact upon the venue provisions either of the Securities Acts or of the National Bank Act. It seems clear, however, that the Congress of the early 1930's envisioned the Glass-Steagall Act and other banking statutes as governing the securities problems related to banks, and thus scarcely could have viewed the nationwide venue provisions of the Securities Acts as being of particular importance in remedying these bank-related problems.

CONCLUSION

For the above reasons, the venue provisions of the Securities Exchange Act of 1934 did not repeal, either expressly or impliedly, the venue provisions of the National Bank Act, and the judgment below should be affirmed.

Respectfully submitted,

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I authorize the filing of the above brief.

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Supreme Court, U. S.
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JAN 3 1976
MICHAEL RODAK, JR., CLERK

75-
No. 268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

HYMAN RADZANOWER,

Petitioner,

against

THE FIRST NATIONAL BANK OF BOSTON,

Respondent,

and

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W. J. BRESNAN, H. J. SCHAFLY, LEONARD TOW, R. C. TODD, JR., B. P. SIMON, J. B. GREEN, L. H. READ, R. G. WILSON, H. E. FLAHERTY, B. D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R. F. LEWIS, P. L. LOWE, CHARLES LUCKMAN, M. B. MITCHELL, A. E. PUCKETT, J. H. RICHARDSON, M. E. LIVINGSTON, and JACK WRATHER,

Defendants.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE CHASE MANHATTAN BANK, N.A., *AMICUS CURIAE*

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IN THE

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OCTOBER TERM, 1975

No. 268

HYMAN RADZANOWER,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF BOSTON,

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and

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W. J. BRESNAN, H. J. SCHAFLY, LEONARD TOW, R. C. TODD, JR., B. P. SIMON, J. B. GREEN, L. H. READ, R. G. WILSON, H. E. FLAHERTY, B. D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R. F. LEWIS, P. L. LOWE, CHARLES LUCKMAN, M. B. MITCHELL, A. E. PUCKETT, J. H. RICHARDSON, M. E. LIVINGSTON, and JACK WRATHER,

Defendants.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE CHASE MANHATTAN BANK, N.A., *AMICUS CURIAE*[1]

QUESTION PRESENTED

Whether, in determining the venue of an action under the Securities Exchange Act of 1934 ("the 1934 Act"), 15 U.S.C. §§ 78a, *et seq.*, against a national banking associa-

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[1] This brief is submitted with the consent of the parties.

tion, the venue provision of the 1934 Act, applicable to actions brought thereunder, 15 U.S.C. § 78aa, is to be construed as having repealed by implication the special venue provision of the National Bank Act of 1864, 12 U.S.C. § 94, applicable to actions brought against national banking associations.

STATUTES INVOLVED

The venue provision of the 1934 Act (Section 27), 15 U.S.C. § 78aa, provides:

> "... Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

The venue provision of the National Bank Act, 12 U.S.C. § 94, provides:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

STATEMENT

In this action under Section 10(b) of the 1934 Act in the District Court for the Southern District of New York the

defendants included respondent First National Bank of Boston, a national banking association established in Boston, Massachusetts.

Respondent moved to dismiss the action as to it on the ground that under Section 94 of the National Bank Act it could be sued only in the district in which it was established. Petitioner-plaintiff, in opposing the motion, argued that respondent had waived Section 94 by filing with the New York Superintendent of Banks a designation to receive process on its behalf. In an opinion dated October 21, 1974, the District Court rejected this contention and dismissed the action. The Court of Appeals for the Second Circuit affirmed without opinion on May 23, 1975.

In his petition for certiorari, petitioner virtually abandoned his waiver point and advanced a new argument for reversal of the dismissal on the ground that Section 27 of the 1934 Act should be construed to repeal by implication Section 94 of the National Bank Act. Since petitioner chose to assert this claim late in the litigation, it was not considered by the court below.

THE INTEREST OF THE CHASE MANHATTAN BANK, N.A.

The Chase Manhattan Bank, N.A. ("Chase") is a national banking association, having its principal office in New York City. From time to time Chase has been a defendant in actions commenced in or sought to be transferred to jurisdictions outside of New York involving the applicability of Section 94, including actions in which its implied repeal was considered.[2] Chase is vitally concerned that this Court uphold the protection afforded by the National Bank Act against disruptive litigation against national banks away from their headquarters.

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[2] See, e.g., *Wyndham Assoc.* v. *Bintliff*, 398 F.2d 614 (2d Cir.), *cert. denied*, 393 U.S. 977 (1968), and *Aloha Airlines, Inc.* v. *Hawaiian Airlines, Inc.*, 58 F.R.D. 429 (D.Hawaii 1973).

ARGUMENT

POINT I

Venue in an action against a national bank under the 1934 Act is governed by the National Bank Act and not by the 1934 Act.

The principles which govern this case are well established by decisions of this Court. In *Mercantile Nat'l Bank* v. *Langdeau,* 371 U.S. 555 (1963) and *Michigan Nat'l Bank* v. *Robertson,* 372 U.S. 591 (1963), the Court, finding the provisions of Section 94 to be "mandatory," held that a transitory action against a national bank must be brought in one of the places specified by Section 94, even though other venue statutes might permit suit elsewhere. In so holding, the Court reaffirmed the rule it had earlier laid down in *Stonite Prods. Co.* v. *Melvin Lloyd Co.,* 315 U.S. 561 (1942) and *Fourco Glass Co.* v. *Transmirra Prods. Corp.,* 353 U.S. 222 (1957), holding that a venue provision covering a specific subject (patent infringement) must prevail over the federal venue statute of general application and greater latitude.

Section 94 applies to a specific class of defendants—national banks—whose organization and operation are controlled by other provisions of the National Bank Act (12 U.S.C. §§ 1 *et seq.*). In contrast, Section 27 of the 1934 Act is generally applicable to all actions under the 1934 Act, regardless of the type of defendant. The clear conclusion appears to be that Section 94, and not Section 27, controls in actions against national banks, and that this action could have been commenced only in the District of Massachusetts, where respondent is established.[3]

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[3] Under Section 94 a national bank is "established" in the district where its principal place of business, as specified in its charter, is located. *Buffum* v. *Chase Nat'l Bank,* 192 F.2d 58 (7th Cir. 1951), *cert. denied,* 342 U.S. 944 (1952); *General Elec. Credit Corp.* v. *James Talcott, Inc.,* 271 F.Supp. 699 (S.D.N.Y. 1966).

However, it is here urged, as it has repeatedly been urged in other cases, that Section 27 should be read to repeal Section 94 by implication.

Most courts which have considered the argument, including the Second and Ninth Circuits, have rejected it.[4]

The Court of Appeals for the Third Circuit held to the contrary in *Ronson Corp.* v. *Liquifin Aktiengesellschaft,* 483 F.2d 852 (3d Cir. 1973).[5] There the court upheld venue in the District of New Jersey against a national bank established in Brooklyn, New York. In so holding, the Court relied on what it believed to be a liberal construction of the 1934 Act:

> "We are guided by the realization that the Securities Exchange Act must be liberally interpreted in order to accomplish the congressional objects of regulating the securities market and of affording proper disclosure to the investing public, as well as preventing fraud in securities trading. In recognition of the national rather than local nature of the transactions involved, Congress enlarged the applicable venue and service of process requisites. An unduly narrow ruling on venue could not but inhibit and reduce the effectiveness of the remedies provided by the Act." 483 F.2d at 854

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[4] *First Nat'l Bank* v. *United States District Court,* 468 F.2d 180 (9th Cir. 1972); *United States Nat'l Bank* v. *Hill,* 434 F.2d 1019 (9th Cir. 1970); *Klein* v. *Bower,* 421 F.2d 338 (2d Cir. 1970); *Bruns, Nordeman & Co.* v. *American Nat'l Bank & Trust Co.,* 394 F.2d 300 (2d Cir.), *cert. denied,* 393 U.S. 855 (1968); *Odette* v. *Shearson, Hammill & Co.,* 394 F.Supp. 946 (S.D.N.Y. 1975); *McClung* v. *LaSalle Nat'l Bank,* 387 F.Supp. 977 (S.D.Iowa 1975); *Allied Steel & Tractor Prods. Inc.* v. *First Nat'l City Bank,* 54 F.R.D. 256 (N.D. Ohio 1971); *Rome* v. *Eltra Corp.,* 297 F.Supp. 314 (E.D.Pa. 1969); *General Elec. Credit Corp.* v. *James Talcott, Inc.,* 271 F.Supp. 699 (S.D.N.Y. 1966)

[5] See also *Carpenter* v. *Hall,* 352 F.Supp. 806 (S.D.Tex. 1972); *Levin* v. *Great Western Sugar Co.,* 274 F.Supp. 974 (D.N.J. 1967).

In reaching this result, the Third Circuit misapplied the standards of construction repeatedly enunciated by this Court. As stated in *Washington* v. *Miller,* 235 U.S. 422, 428 (1914),

> ". . . where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is . . . that the special is intended to remain in force as an exception to the general."

In the context of the 1934 Act, the Court stated in *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963), that "[r]epeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent possible." This standard was recently applied in *Gordon* v. *New York Stock Exchange,* 95 S.Ct. 2598 (1975), holding that former Section 19(b)(9) of the 1934 Act, by authorizing commission fixing by securities exchanges, repealed by implication Section 1 of the Sherman Act (15 U.S.C. § 1). In so holding, the Court pointed out that prior to enactment of the 1934 Act Congressional hearings had adduced testimony concerning the long-standing practice of exchange commission fixing. In the Court's view, the 1934 Act "reflected" this legislative history. 95 S.Ct. at 2602-04.

Gordon makes plain that a necessary condition for implied repeal is evidence of a "clear and manifest" intent by Congress to effect that result. *United States* v. *Borden Co.,* 308 U.S. 188 (1939). The Court consistently has relied upon Congressional deliberations to determine that intent. For example, in *United States Alkali Export Ass'n* v. *United States,* 325 U.S. 196 (1945), the Court was faced with the question whether the Webb-Pomerene Act (15 U.S.C. §§ 61 *et seq.*) had repealed by implication the Sherman Act. The Court noted that in the reports of Congressional committees there was only a vague reference to the "precise problem

presented by the present case." In rejecting the argument for implied repeal, the Court stated: "The absence of more extended discussion of the matter is in itself persuasive evidence that there was no purpose to repeal" the earlier act. 325 U.S. at 210-11.

Even where the legislative history has disclosed consideration of the pertinent issues, the Court has still refused to find an implied repeal. Recently, in the *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974), the question was whether the Reorganization Act (45 U.S.C. §§ 701 *et seq.*) had impliedly repealed the Tucker Act (28 U.S.C. § 1491), dealing with claims against the United States. While noting legislative discussion of the possibility of limiting claims against the government, the Court rejected the inference of a repeal by implication, stating, "[t]he most that can be said is that the Rail Act is ambiguous on the question." 419 U.S. at 133. Accord, *Penn Dairies* v. *Milk Control Comm'n,* 318 U.S. 261 (1943) (repeal is "not to be implied where the legislative command, read in the light of its history, remains ambiguous.")[6]

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[6] A reflection of the Court's strict standards for implied repeal is the paucity of cases supporting that result. In *Friends of the Earth* v. *Armstrong,* 485 F.2d 1 (10th Cir. 1973) (dissent), *cert. denied,* 414 U.S. 1171 (1974), Chief Judge Lewis reviewed the cases up to that time, finding one instance in which implied repeal had been upheld (*Mathews* v. *United States,* 123 U.S. 182 (1887)), but a "multitude of cases" in which it had been rejected: *Universal Interpretive Shuttle Corp.* v. *Washington Metro. Area Transit Comm'n,* 393 U.S. 186 (1968); *Jones* v. *Mayer Co.,* 392 U.S. 409 (1968); *Amell* v. *United States,* 384 U.S. 158 (1966); *United States* v. *Welden,* 377 U.S. 95 (1964); *United States* v. *Zacks,* 375 U.S. 59 (1963); *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321 (1963); *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963); *Mercantile Nat'l Bank* v. *Langdeau,* 371 U.S. 555 (1963); *Bulova Watch Co.* v. *United States,* 365 U.S. 753 (1961); *Fourco Glass Co.* v. *Transmirra Prods. Corp.,* 353 U.S. 222 (1957); *Rosenberg* v. *United States,* 346 U.S. 273 (1953); *Federal Trade Comm'n* v. *A.P.W. Paper Co.,* 328 U.S. 193 (1946); *United States* v. *Borden Co.,* 308 U.S. 188 (1939); *Posadas* v. *National City Bank,* 296 U.S. 497 (1936); *United States* v. *Noce,* 268 U.S. 613 (1925); *United States* v. *Greathouse,* 166 U.S. 601 (1897).

In this case, there is not even "ambiguous" legislative history—there is simply none at all. In view of this complete legislative silence, Judge Friendly concluded in *Bruns, Nordeman & Co.* v. *American Nat'l Bank & Trust Co.*, 394 F.2d 300, 304 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968): "if the problem [repeal of § 94 by § 27] had occurred to Congress, we cannot be at all certain how that body would have wished it resolved." In so holding, the Second Circuit, along with most other courts, followed the decisions of this Court requiring evidence not only that Congress specifically considered the possibility of a conflict between earlier and later statutes but also that Congress intended to repeal the earlier one.

The Third Circuit in *Ronson* reached a result at odds with other courts because of a failure to apply this standard. The Third Circuit was apparently guided by the erroneous belief that legislative silence supports a conclusion of implied repeal:

> "[We] believe that the failure to mention national banks in this setting implies a congressional intent to include them among those governed by the more liberal standards of the Securities Exchange Act."[7] 483 F. 2d at 854

Ultimately, the court in *Ronson* rested not on legal precedent but on a policy judgment that the objectives of the 1934 Act would be achieved by an implied repeal of Section 94.

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[7] The court in *Ronson* also reasoned that since the 1934 Act, along with the Securities Act of 1933, refers specifically to national banks, (e.g., in U.S.C. § 781(i)), the absence of such reference in Section 27 evidences an intent not to exempt national banks from that venue provision. Section 781(i) does no more than vest the Comptroller of the Currency, rather than the SEC, with regulatory authority over national banks. Indeed, the failure to mention national banks in the venue section is easily explained by the fact that since they were already covered by Section 94, there was no need to exempt them specifically from Section 27.

Although the Third Circuit did not address this issue specifically, it might be argued that since Section 94 requires suit against a national bank in the forum where it is established, the section would disadvantage a plaintiff desiring to sue all potential defendants in one forum. Regardless of whether this may or may not be true in any given case, this Court has already disposed of the same argument in *Mercantile Nat'l Bank, supra,* by stating that a broader venue statute is for Congress—not the Court—to consider:

> "The consequence of our decision, appellee says, is that a litigant will be unable to join two national banks in the same action . . . if they are located in different districts . . . such a situation is a matter for Congress to consider . . . even if all of the 145 defendants [in the instant case] may not be sued in one proceeding . . . this, of course, is insufficient basis for departing from the command of the federal statute." 371 U.S. at 563-64

The so-called policy considerations afford little support to the argument for implied repeal. Since Section 27, in contrast to Section 94, is a broad venue statute, the effect of repealing Section 94 by implication would be far-reaching. Rather than requiring suit against a national bank in one district, it would permit suit in any district where the bank "transacts business" or where any of the allegedly illegal acts may have occurred. Thus, the issue is not simply, as it was in *Ronson,* whether a Brooklyn bank must defend a suit in New Jersey. The issue is whether a Boston bank will be required to defend in California (*First Nat'l Bank* v. *United States District Court, supra*), a New York bank in Ohio (*Allied Steel & Tractor Prods. Inc.* v. *First Nat'l City Bank, supra*), or a Chicago bank in Iowa (*McClung* v. *LaSalle Nat'l Bank, supra*).

Although it might be argued that the burdens of defending in far-removed forums may now be less than when Section 94 was enacted, national banks nonetheless still perform

a public function under the supervision of the Comptroller of the Currency. See *Bruns, Nordeman & Co.* v. *American Nat'l Bank & Trust Co., supra.* Whether the defense of suits in foreign jurisdictions would be an unacceptable burden is a matter for legislative determination, as contemplated by this Court in *Mercantile Nat'l Bank.* Despite the invitation in the Court's opinion in that case, decided thirteen years ago, Congress has made no attempt to amend or repeal Section 94. As this Court noted in *Georgia* v. *Pennsylvania R.R. Co.*, 324 U.S. 439 (1945), Congressional inaction is strong evidence against a repeal by implication.

CONCLUSION

The issue being one for resolution by Congress, the decision below should be affirmed.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-268

HYMAN RADZANOWER,

Petitioner,

VS.

TOUCHE ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SCHAFER, W. J. BRESNAN, H. J. SCHAFLY, LEONARD TOW, R. C. TODD, JR., B. P. SIMON, J. B. GREEN, J. H. READ, R. G. WILSON, H. E. FLAHERTY, B. D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R. F. LEWIS, P. L. LOWE, CHARLES LUCKMAN, M. B. MITCHELL, A. E. PUCKETT, J. H. RICHARDSON, M. E. LIVINGSTON, JACK WRATHER, THE FIRST NATIONAL BANK OF BOSTON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE FIRST NATIONAL BANK OF CHICAGO

CONSENT OF THE PARTIES

This brief is filed by The First National Bank of Chicago, a national banking association organized under the laws of the United States (hereinafter referred to as "First Chicago") with the written consents of the parties, which have been filed with this Court and copies of which are attached hereto as Appendices A and B.

QUESTION PRESENTED

The fundamental issue to be decided in this case, one which clearly affects the interests of First Chicago, is:

> Whether the specific venue provision of the National Bank Act (12 U.S.C. § 94) enacted by Congress to facilitate the operation and administration of the national banking system by affording special protection to national banks prevails over the venue provision of the Securities Exchange Act of 1934 (15 U.S.C. § 78aa), which is not specific with respect to the defendant involved.

First Chicago submits that the issue presented should be decided on the basis of statutory interpretation, giving particular consideration to the applicable legislative history and to established judicial principles for determining repeal by implication, rather than on the basis of the general policy arguments propounded by Petitioner for favoring plaintiffs in securities cases.[1] The clear intent of Congress in carving out a special venue rule for national banks, based on the perception that such banks constitute a unique category of defendants, should not be nullified by Petitioner's notion of what is or is not in the public interest.

THE INTEREST OF THE FIRST NATIONAL BANK OF CHICAGO

First Chicago was chartered in 1863 and, measured by total deposits, is presently the ninth largest commercial bank in the United States. It makes loans to, accepts deposits from, and acts in a fiduciary capacity for, individuals, associations and corporations throughout the nation.

[1] E.g., Petitioner's Brief at 12.

First Chicago has a continuing interest in the administration of the National Bank Act (12 U.S.C. § 1 *et seq.*). In the recent past, First Chicago has been a party to numerous suits in both federal and state courts involving the application of 12 U.S.C. § 94. The application of 12 U.S.C. § 94 generally, as well as in the specific context of its apparent conflict with the venue provisions of the Securities Exchange Act of 1934 raised by this case, is of critical concern to commercial banks, such as First Chicago, located in the nation's financial centers.

Although First Chicago is not involved in the litigation between the parties, which arises in the context of a commercial loan transaction, a determination of the applicable venue statute in securities cases involving national banks has broad implications for such banks acting as trustees under corporate pension and profit-sharing plans and in other fiduciary capacities, as well as in other areas of banking activity. It is because of these broad implications that First Chicago respectfully requests this Court to consider the arguments presented herein.

SUMMARY OF ARGUMENT

The legislative history of the federal securities laws contains no evidence of the clear and manifest Congressional intention necessary to demonstrate implied repeal of the special national bank venue provision contained in 12 U.S.C. § 94. On the contrary, an examination of that history shows that Congress carefully considered the role played by national banks in securities transactions and acted specifically and forcefully to deal with the unique problems created by a national bank's securities dealings without modifying the venue provision of 12 U.S.C. § 94.

In the absence of a clear Congressional intention to repeal 12 U.S.C. § 94 this Court should not upset the comprehensive and unified system of national bank regulation on the basis of policy arguments founded on Petitioner's perception of a better procedural mechanism for handling substantive securities law problems. These arguments should be addressed to Congress.

ARGUMENT

First Chicago respectfully urges this Court to hold that the specific venue provision of the National Bank Act prevails over the venue provision of the Securities Exchange Act of 1934 for the reasons hereinafter set forth.

I.

During the period in which Congress considered the Securities Exchange Act of 1934, it also considered carefully the unique role of national banks in the securities industry. A reading of the pertinent legislative history during the early 1930's shows a Congressional intention to broaden the special protections afforded to national banks and to the public based on the unique role of national banks in the economy, and not to repeal other special protections previously granted.

Petitioner argues that, since the National Bank Act was enacted in 1864, when there was no regulation of securities, the venue provisions of the securities laws, which Congress enacted some seventy years later to regulate investment practices, should prevail over the earlier enacted venue provisions of the National Bank Act.[2] The implication of Petitioner's argument is that Congress ignored the role of national banks in the securities industry when it enacted the federal securities laws in the early 1930's, and that if

[2] Petitioner's Brief at 24.

Congress had considered national banks and the National Bank Act in connection with its adoption of comprehensive securities legislation during the early 1930's, it surely would have repealed 12 U.S.C. § 94. Because Congress did not in fact repeal 12 U.S.C. § 94, Petitioner argues that its repeal should be implied.

Such an implication cannot be inferred from an examination of pertinent legislative history during this period. Such an examination reveals that Congress was indeed scrutinizing the role of national banks in securities transactions, and that Congress acted expressly and specifically to deal with the unique problems which it perceived in securities transactions involving national banks. Evidence of this scrutiny and action is plentiful.

For example, in enacting the Securities Act of 1933, Congress exempted in the same clause both securities issued by national banks and securities issued by instrumentalities of the Government of the United States from the registration requirements imposed by Section 3(a)(2) of that Act (15 U.S.C. § 77c(a)(2)). The reason given by Congress for the exemption makes clear that Congress considered national banks to be unique entities with respect to securities transactions, as it did federal government instrumentalities:

> "Securities of instrumentalities of the Government of the United States are also exempted, as well as securities issued by a national bank or by a Federal Reserve bank. Securities issued by Government instrumentalities are not generally sold in the market while adequate supervision over the issuance of securities of a national bank is exercised by the Comptroller of the Currency." H.R. Rep. No. 85, 73rd Cong., 1st Sess. 14 (1933).

The rationale for this exemption of securities issued by national banks from the registration requirements is analogous

to the rationale for the special venue provision for national banks in that Congress deemed special treatment of national banks to be consistent with their unique nature. Further, the securities exemption indicates that Congress considered the national banking system when it enacted the federal securities laws. *See also* S. Rep. No. 47, 73rd Cong., 1st Sess. 3-4 (1933).

The Banking Act of 1933, commonly referred to as the Glass-Steagall Act, and its legislative history provide further evidence that Congress was attempting to complement the general securities laws with special restrictions on dealings by national banks in securities at the same time that it was considering the Securities Act of 1933. It did this by restricting the power of a national bank to purchase and sell securities for its own account or to engage in underwriting activities. *See* 12 U.S.C. § 24(7). Clearly, the Glass-Steagall Act demonstrates that Congress deemed national banks to have a unique position in the nation's financial system requiring special treatment under the securities laws.[3]

[3] This Court recently noted the special provisions which Congress enacted to regulate a national bank's securities dealings. In *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971), this Court held that the Glass-Steagall Act prohibited a national bank from establishing and dealing in participations in a pool of securities analogous to a mutual fund. This Court stated:

> "In sum, Congress acted to keep commercial banks out of the investment banking business largely because it believed that the promotional incentives of investment banking and the investment banker's pecuniary stake in the success of particular investment opportunities was destructive of prudent and disinterested commercial banking and public confidence in the commercial banking system. . . . The Glass-Steagall Act was a prophylactic measure directed against conditions that the experience of the 1920's showed to be great potentials for abuse." 401 U.S. at 634, 639.

The report submitted by Representative Steagall for the Committee on Banking and Currency of the House of Representatives on May 19, 1933 in support of the Glass-Steagall Act makes clear that the Act was intended to protect national banks and their depositors from the risks inherent in the speculative investment of bank funds. H.R. Rep. No. 150, 73rd Cong., 1st Sess. 1 et seq. (1933). It is apparent that during the depression days of the early 1930's Congress was considerably concerned with preserving a sound national banking system. The argument that Congress intended by its enactment of the Securities Exchange Act of 1934 partially to repeal by implication the National Bank Act venue provision with respect to national bank defendants in securities cases is inconsistent with the evidence of the legislative history, which indicates Congress' intent to afford additional protection to national banks in the national interest.

Further evidence of Congress' careful scrutiny of the role of banks in securities transactions is found in S. Rep. No. 1455, 73rd Cong., 2d Sess. 155 et seq. (1934), in which the Senate exhaustively examined the relationship between commercial banking and securities speculation with a view to determining the problems in this area which merited legislative reform. Nowhere in this report (or for that matter in any Congressional report issued during the early 1930's dealing with the securities industry or the relationship of banking thereto of which First Chicago is aware) was any intention expressed to limit the national bank venue provision to non-securities cases.

A review of the pertinent legislative history during the period under discussion confirms that Congress did indeed give serious consideration to the relationship of national banks with the securities industry, and that its intent was to

treat national banks as unique parties to securities transactions, requiring special protection. The main theme that runs through the Congressional reports is the protection of the banking public and the furtherance of the national interest in a sound banking system through safeguards specifically fashioned to regulate the investment and underwriting practices of national banks. This theme of protective legislation in connection with a national bank's security dealings was entirely consistent with the unique venue protection which Congress had earlier afforded national banks under 12 U.S.C. § 94. Both the bank securities legislation and the National Bank Act venue provision are based on a Congressional philosophy that national banks require special protection based on the unique role they play in the nation's economy.

Petitioner's argument[4] that implied repeal of the National Bank Act's venue protection is necessary to make the regulatory scheme of the securities laws work misses the point. The legislative histories of both the securities laws and the National Bank Act demonstrate an overriding Congressional concern that unique statutory protections were necessary to make the national banking system work.[5] Had Congress deemed partial repeal of the national bank venue provision consistent with this concern, it is reasonable to assume that somewhere in the long discourses con-

[4] Petitioner's Brief at 24.

[5] Petitioner characterizes the issue in this case as involving a conflict between 12 U.S.C. § 94 on the one hand and the entire substantive regulatory scheme of the Securities Exchange Act of 1934 on the other (Petitioner's Brief at 24). In fact, 12 U.S.C. § 94 is itself a part of a comprehensive statutory scheme dealing with national banks. As this Court stated in *Cook County National Bank* v. *United States,* 107 U.S. 445, 448 (1882):

> "We consider [the National Bank Act] as constituting by itself a complete system for the establishment and government of national banks . . . ."

tained in Congressional reports on these matters there would be some indication to that effect. There is none.

To find repeal by implication "[t]he intention of the legislature to repeal must be clear and manifest". *Red Rock* v. *Henry,* 106 U.S. 596, 602 (1882). See also *Posadas* v. *National City Bank,* 296 U.S. 497, 504 (1936) and *United States* v. *Borden Co.,* 308 U.S. 188, 198-199 (1939). When Petitioner argues, in the face of a legislative history which demonstrates that Congress specifically and thoughtfully considered the unique problems of national banks' securities activities, that Congress clearly and manifestly intended to repeal 12 U.S.C. § 94 by enacting the more general venue provisions of the Securities Exchange Act of 1934, he assumes a heavy burden indeed.[6] The legislative history outlined above compels a conclusion that Congress did not intend the securities laws to modify the National Bank Act except for the express additions to it made by the Glass-Steagall Act.

This conclusion is fortified by the record of the careful attention Congress historically has given to banking matters. In *First Agricultural National Bank of Berkshire County* v. *State Tax Commission,* 392 U.S. 339, 341, 345 (1968), this Court noted Congress' particularly active role in the banking area:

> "As will be seen, Congress has been far from reluctant to pass legislation in the banking field. There are important committees on banking and currency in both

[6] Petitioner's argument of implied repeal is based on Congressional silence. Petitioner's Brief at 16 states: "It is petitioner's contention at bar, that Congress' silence evidences its intent, in 1934, to impose the venue provisions of the 1934 Act on all involved, without excepting banks." Congressional silence falls far short of the clear and manifest intention to repeal required by the decisions of this Court to support a conclusion of implied repeal.

> Houses which continually monitor banking affairs and propose new legislation when changes are felt to be needed . . . . [T]his Court is asked to change what legislative history and prior decisions have established is the precise meaning of an Act of Congress. This we cannot do. For, as we pointed out above, the banking field has traditionally been an area of particular concern marked by legislation responsive to new problems."

II.

The clear and manifest Congressional intention necessary to demontrate the implied repeal *pro tanto* of 12 U.S.C. § 94 cannot be supplied by Petitioner's arguments, which are based on his conception of desirable policy.

Petitioner attempts to buttress his argument of implied repeal by urging nebulous policy considerations in support of his position.[7] This attempt must fail. Considerations of policy may not be substituted for the essential requirement that a finding of implied repeal must be based on a clear and manifest Congressional intent to repeal.[8] In the absence

[7] Two of the three points of Petitioner's argument dealing with the conflict between 12 U.S.C. § 94 and 15 U.S.C. § 78(aa), "Fundamental Fairness" and "Judicial Economy", are based on Petitioner's conception of desirable public policy. *See* Petitioner's Brief at 12-22 and 30-33.

[8] The only policy argument which Petitioner perceives in support of 12 U.S.C. § 94 is the need of a national bank to preserve its books and records at its principal place of business from the hazard of subpoena to remote jurisdictions (Petitioner's Brief at 16 and 24). This perception is derived from a sentence in the Court's opinion in *First National Bank of Charlotte* v. *Morgan*, 132 U.S. 141, 145 (1889). The sentence immediately following the sentence upon which plaintiff relies articulates a more significant consideration. Both sentences are quoted below:

> "This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process from state courts. [Citing cases] But, without indulging in conjecture as to the object of the exemption in question, it is sufficient that it was granted by Congress, and, if it had been claimed by the defendant when appearing in the Superior Court of Cleveland County, must have been recognized." 132 U.S. at 144.

of a clear Congressional intention to repeal, this Court has been reluctant to imply repeal even when the conflict is between important substantive regulatory schemes. *A fortiori,* in the absence of clear Congressional intention, implied repeal may not be found in cases involving matters of procedure such as venue, especially where the venue provision against which the argument of implied repeal is asserted is a part of a comprehensive statutory scheme dealing with the specific type of entity for which a special venue privilege has been created.

In *Silver* v. *New York Stock Exchange* 373 U.S. 341 (1963), this Court considered a substantive conflict between the Securities Exchange Act of 1934 and the antitrust laws. The *Silver* case involved an order by the New York Stock Exchange to a number of its members to remove private telephone connections between the members' offices and the offices of non-members. The order was adopted under authority granted by the Securities Exchange Act of 1934. Compliance with the order constituted a *per se* violation of Section 1 of the Sherman Act (15 U.S.C. §1). 373 U.S. at 347-348. Even in the case of direct substantive conflict between the Securities Exchange Act of 1934 and the earlier enacted antitrust laws, this Court was reluctant to find implied repeal. This Court stated:

> "The Securities Exchange Act contains no express exemption from the antitrust laws, or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication, and '[i]t is a cardinal principle of construction that repeals by implication are not favored.' *United States* v. *Borden Co.* 308 U.S. 188, 198; see

> *Georgia* v. *Pennsylvania R. Co.* 324 U.S. 439, 456-457; *California* v. *Federal Power Comm'n.* 369 U.S. 482, 485. Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." 373 U.S. at 357.

The *Silver* case involved a direct conflict between two substantive regulatory schemes. The provisions of 12 U.S.C. § 94 in no way conflict with the regulatory provisions of the Securities Exchange Act of 1934. The venue provisions of both the National Bank Act and the Securities Exchange Act of 1934 merely establish the forum in which substantive obligations may be enforced. Applying the test adopted by this Court in *Silver,* implied repeal of 12 U.S.C. § 94 is not necessary to make the Securities Exchange Act of 1934 work. Giving full effect to the venue provision of the National Bank Act will have no impact at all on the substantive provisions of the securities laws.

As the court recognized in *Bruns, Nordeman & Co.* v. *American National Bank & Trust Company,* 394 F.2d 300, 304 (2d Cir. 1968), in holding that 12 U.S.C. § 94 determined venue for a national bank defendant in a securities case:

> "Here suit against the bank in Chicago is not impossible but simply inconvenient. Appellant's case thus does not measure up to the standards laid down in United States v. Borden & Co., 308 U.S. 188, 198-199, 60 S.Ct. 182, 84 L.Ed. 181 (1939), see also Silver v. New York Stock Exchange, 373 U.S. 341, 357, 83 S.Ct. 1246, 10 L.Ed. 2d 389 (1963), to justify a holding of repeal—even partial repeal—by implication."

Courts traditionally have declined to broaden the reading of venue statutes by implication to effect what may be perceived by some to be a more desirable policy result. For example, in *Olberding* v. *Illinois Central Railroad Co.,* 346 U.S. 338, 340 (1953), a case in which it was argued that defendant impliedly waived the venue protection afforded by 28 U.S.C. § 1391(a), this Court stated:

> "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction."

In the *Olberding* case this Court declined to imply the consent of a defendant to be sued in a district where he did not reside because the defendant committed a tort in that district. Likewise, this Court should not in the instant case imply the repeal of a venue statute which specifically and unambiguously bases venue on a party's status as a national bank.

The view that the plain language of venue statutes may not be modified by implication to make them compatible with changing conceptions of public policy has been reiterated by many courts in the specific context of 12 U.S.C. § 94. As this Court stated in *Mercantile National Bank at Dallas* v. *Langdeau,* 371 U.S. 555, 563 (1963):

> "The consequence of our decision, appellee says, is that a litigant will be unable to join two national banks in the same action in the state courts if they are located in different counties or in the federal courts if they are located in different districts. But aside from not being presented by these cases, such a situation is a matter for Congress to consider."

See also *Northside Iron & Metal Co.* v. *Dobson & Johnson, Inc.,* 480 F.2d 798, 800 (5th Cir. 1973) ("If the venue statute is to be amended or repealed, Congress is the body which must act to do so and the body to which appellants' argument should be addressed."); *Bruns, Nordeman & Co.* v. *American National Bank & Trust Co.,* 394 F.2d 300, 304 (2d Cir. 1968) ("Granted that the situation calls for a remedy, this lies in Congress. . . .")

Broad policy considerations may not be substituted for the requirement that implied repeal of a statute must be based affirmatively on a clear and manifest Congressional intention to repeal.

CONCLUSION

For the foregoing reasons, First Chicago respectfully submits that the judgment of the United States Court of Appeals for the Second Circuit affirming dismissal of the complaint in this action with respect to The First National Bank of Boston should be affirmed.

Respectfully submitted,

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January 2, 1976

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December 2, 1975

Donald J. Yellon, Esq.
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Radzanower v. Touche, Ross & Co., et al.
October Term, 1975
No. 268

Dear Mr. Yellon:

We are hereby writing on behalf of The First National Bank of Boston (the "Bank"), respondent in the above-captioned action, to confirm the Bank's consent to the filing on its behalf of an amicus curiae brief by The First National Bank of Chicago.

Enclosed please find a copy of a letter in which plaintiff's counsel consents to the filing of an amicus curiae brief by The First National Bank of Chicago.

A duplicate original of this letter and the original copy of plaintiff counsel's letter of consent have been transmitted to the Clerk of the Supreme Court.

Very truly yours,

Richard I. Janvey

Enclosure
cc: Stanley S. Stroup, Esq.
T. McLean Griffin, Esq.

APPENDIX B

DEBEVOISE, PLIMPTON, LYONS & GATES

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